U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

Oct 15 11 38 AM '03

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF VERMONT**

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| WAYNE SENVILLE; DONALD HORENSTEIN; VERMONT PUBLIC INTEREST RESEARCH GROUP, INC.; FRIENDS OF THE EARTH, INC; SIERRA CLUB, INC.; and CONSERVATION LAW FOUNDATION<br><br>Plaintiffs<br><br>v.<br><br>MARY E. PETERS in her official capacity as Administrator of the Federal Highway Administration (FHWA), and PATRICIA A. MCDONALD in her official capacity as Secretary of the Vermont Agency of Transportation (VTrans).<br>Defendants | Civ. No. 2:03-cv-279 |

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Senville, Horenstein, Vermont Public Interest Research Group (VPIRG), Friends of the Earth, Inc. (FoE), Sierra Club, and Conservation Law Foundation, Inc. (CLF), pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., §4(f) of the Department of Transportation Act, 49 U.S.C. § 303, the Federal-Aid Highway Act, 23 U.S.C. §101 *et seq.*, the Administrative Procedures Act (APA), 5 U.S.C. §§ 551 et seq., and the Civil Rights Act, 42 U.S.C. § 1983, allege as follows:

## INTRODUCTION

1. The Chittenden County Circumferential Highway (CCCH or the Highway) was first proposed in 1968 as a four-lane "loop" or "belt" highway that would stretch 16.7 miles from Interstate 89 in Williston, Vermont north and west through Essex, eventually connecting with VT Route 127 in Colchester, Vermont.

2. In 1986 the State of Vermont prepared the first and only Environmental Impact Statement on the impacts of the CCCH. Since that time, Chittenden County has changed significantly, and substantial new information on the utility and impact of road building has become available. However, the defendants have flatly refused to provide the public with an up-to-date evaluation of the Highway's impacts.

3. Rather than consider modern, cheaper, and more effective alternatives to the CCCH, the Defendants have instead engaged in a factual shell game and have relied on patently invalid studies – concealing the true impacts of the Highway in an attempt to justify building a 1960's era highway in modern Chittenden County. For example:

- The Defendants tout studies indicating that the fully-built, four-lane CCCH will reduce traffic congestion. However, Defendant VTrans' own web-site describes the completed CCCH as only a two-lane highway. Defendants do not know when, if ever, the CCCH could

be expanded to four lanes, and have not determined whether a two-lane highway will alleviate traffic.

- The Defendants' recent environmental assessments weigh the benefits of the fully-built, four-lane CCCH, but only against a single segment's adverse impacts.

- In the rare instance when Defendants purport to look at the fully-built CCCH's impacts, they use a model that assumes the existence of the CCCH to examine the impacts of *both* the build and No-Build scenarios, thus forcing the inevitable conclusion that the CCCH's impacts would be insignificant.

4. The Defendants' inadequate assessments nevertheless demonstrate that the CCCH, and particularly construction of Segment A-B, will result in several varied and significant impacts, including:

a. increased sprawl and the further dispersal of business and cultural amenities from Downtown Burlington to outlying areas;

b. increased water pollution and runoff into the already polluted waters of Allen Brook, Muddy Brook, Lake Champlain, and other tributaries and wetlands;

c. a significant area-wide increase in traffic congestion;

d. increased air pollution resulting from greater investment and reliance on automobile transportation; and

e. a significant increase in noise pollution affecting sensitive sites surrounding the CCCH corridor.

5. The Defendants also entirely failed to consider a number of important environmental impacts including the impact of the CCCH on state-listed threatened and endangered species.

6. The Defendants are obligated under NEPA to fully assess and consider these impacts *prior* to deciding to build the CCCH or any of its segments.

7. However, the Defendants have systematically obfuscated these impacts in what has become a politically charged effort to assure construction of the CCCH.

8. Indeed the Defendants have even disregarded the United States Environmental Protection Agency's admonishment that they account for the significant changes that have occurred since 1986, and have consistently resisted addressing EPA's concerns over water quality impacts and sprawl. As recently as September 12, 2003, the EPA continued to express strong concerns over the Defendants' failure to adequately mitigate the impacts of water pollution and sprawl.

9. The original 1986 FEIS prepared by the State of Vermont was seriously deficient and failed to adequately evaluate alternatives with less impact or disclose the nature and extent of the CCCH's significant impacts.

10. Although NEPA requires the Federal Government to independently evaluate and supplement the entire 1986 Environmental Impact Statement,

the Federal Highway Administration has yet to so, and it continues to resist bringing it up to date – depriving the public of important information.

11. Rather than evaluate and supplement the 1986 FEIS on July 20, 2002, the Federal Highway Administration simply adopted the 1986 FEIS wholesale.

12. The Defendants then drafted a series of Environmental Assessments (EAs) each reaching the remarkable conclusion that since publication of the 1986 FEIS, "no additional or new significant environmental impacts have been identified."

13. Not only have Defendants failed to properly assess these impacts, they have also failed to adequately mitigate the impacts of the CCCH.

14. The Defendants' failure to properly assess and mitigate the CCCH's impacts constitutes serious and significant violations of NEPA, Section 4(f) of the DOTA, the APA, and 42 U.S.C. § 1983.

15. Because of the Defendants' actions, Plaintiffs seek, *inter alia*, a declaratory ruling that FHWA must comply with NEPA and Section 4(f), and regulations implementing those statutes, by preparing the appropriate NEPA documentation including a supplemental environmental impact statement prior to construction of the CCCH. Until FHWA has fully complied with the relevant provisions of NEPA, Section 4(f) of the Department of Transportation Act, the Federal-Aid Highway Act, and the Administrative

Procedures Act, the Court should enjoin FHWA and VTrans from any further construction of the CCCH.

## JURISDICTION AND VENUE

16. This action arises under the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, 40 CFR Part 1500 *et seq.*, and the Federal Highway Administration's own NEPA regulations, 23 C.F.R. § 770 *et seq.*, as well as §4(f) of the Department of Transportation Act, as amended, 49 U.S.C. § 303, and its implementing regulations, and the Federal-Aid Highway Act, 23 U.S.C. §101 *et seq.* and its implementing regulations. Violations of these statutes and regulations are federal questions. 28 U.S.C. § 1331.

17. Judicial review is sought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 701-706 and the Declaratory Judgment Act, 28 U.S.C. §2201.

18. Jurisdiction over Secretary McDonald, an officer of the State of Vermont, is pursuant to 42 U.S.C. § 1983.

19. Venue is proper in this District because Plaintiffs (and one defendant) reside in this District and a substantial part of the events or omissions giving rise to the claim occurred in, and a substantial part of property that is subject of the action, is situated in this District. 28 U.S.C. § 1391(e).

## DEFENDANTS

20. Mary E. Peters is the Administrator of the Federal Highway Administration (FHWA). In that capacity, defendant Peters is responsible for the administration, operation, and activities of the FHWA. The FHWA is an agency of the United States that develops road transportation systems of the United States. FHWA is an agency of the United States government within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the APA, 5 U.S.C. § 701(b)(1), and is responsible for ensuring that highways are developed in compliance with various federal statutes, including NEPA. Defendant Peters is sued in her official capacity.

21. FHWA is funding construction of the CCCH. It is responsible for assuring compliance with NEPA prior to releasing funds for the construction of the CCCH.

22. Patricia A. McDonald is Secretary of the Vermont Agency of Transportation (VTrans). In that capacity, defendant McDonald is responsible for the administration, operation, and activities of VTrans.

23. VTrans either prepared or contracted for the preparation of NEPA documents for the CCCH. VTrans is the agency that is responsible for construction and operation of the CCCH.

24. The CCCH is a joint or partnership project between VTrans and the FHWA.

## PLAINTIFFS

25. WAYNE SENVILLE:

a. Wayne Senville resides on North Prospect Street in Burlington, Vermont. His business is located in Downtown Burlington at 31 Main Street.

b. Mr. Senville has a master's degree in city planning. He was Director of Local & Regional Planning Assistance in the Vermont Dept. of Housing & Community Affairs from 1988 through 1990, and is the publisher and editor of the national *Planning Commissioners Journal.*

c. Mr. Senville uses public transportation to go from his home to his business one or two times per week.

d. A vibrant Downtown Burlington is very important to Mr. Senville. He enjoys and benefits from shopping and conducting business in Downtown Burlington.

e. The CCCH will result in a significant amount of land becoming subject to sprawl and will contribute to the increased dispersal of population and business in Chittenden County.

f. This will likely diminish Mr. Senville's use and enjoyment of Downtown Burlington, as he will need to drive more and longer distances for both business and personal reasons. Mr. Senville has already noticed that facilities and businesses he relies on are moving to

or locating in areas farther from Downtown Burlington. He is concerned that the CCCH will add to and accelerate this pattern.

g. Sprawl can also result in dispersal of cultural amenities that may reduce the long-term viability of these amenities in Downtown Burlington. For example, the recently built Essex movie theaters are located close to CCCH exits in Essex.

h. Driving to outlying areas is time consuming and expensive.

i. The loss of additional and significant amounts of land to sprawl will weaken Downtown Burlington, diminish in-town opportunities, and require more use of the car. Additional sprawl will also result in the additional shift of businesses from Downtown Burlington to outlying areas and require Mr. Senville to spend more time and money driving.

j. Construction of the CCCH will also add to traffic congestion on roads used by Mr. Senville, including Interstate 89 and Route 15.

k. This additional congestion will likely add to the time and expense incurred by Mr. Senville to transact business and shop outside of the Downtown area.

l. Mr. Senville also enjoys the clear demarcation between town and country. He believes that this clear demarcation sets Vermont aside from other parts of the United States and is very important to Vermont's unique beauty. Mr. Senville was drawn to Vermont, in

large part, because of this attribute. Mr. Senville is concerned that the CCCH will contribute significantly to the loss of this unique attribute.

26. DONALD N. HORENSTEIN:

a. Donald N. Horenstein resides at 13 Northshore Drive in Burlington, Vermont. His home is on the shore of Lake Champlain, next to the bike path, and approximately ¼ mile south from the mouth of the Winooski River. He has lived there since July 1, 1995.

b. He is a member of Friends of the Earth and VPIRG.

c. Mr. Horenstein canoes and fishes in the lower Winooski River and in the Lake. The stretches of the River and most points on the Lake used and enjoyed by Mr. Horenstein are downstream from CCCH discharges.

d. Mr. Horenstein occasionally swims in Lake Champlain. He would like to swim in the lake more often, but does not because of runoff and other pollutants discharged into the Winooski River and the Lake. He would like to swim in the Winooski, but does not because of this pollution. The additional discharges from the CCCH will make the Lake and River less attractive to Mr. Horenstein and diminish his use and enjoyment of these resources.

e. Mr. Horenstein intends to continue using these resources.

f. Mr. Horenstein enjoys the amenities of living in Burlington. Additional sprawl caused by the CCCH will result in the shift of

businesses and cultural resources from Downtown Burlington to outlying areas, making these resources less available to him and his family. Dispersal of businesses and cultural amenities from the Downtown area to outlying areas will significantly diminish his and his family's use and enjoyment of Downtown Burlington.

g. Mr. Horenstein regularly drives throughout Chittenden County and particularly on Interstate 89 and Route 15. Construction of the CCCH will further congest traffic on roads used by Mr. Horenstein.

h. Mr. Horenstein also enjoys the clear demarcation between town and country. He believes that this clear demarcation sets Vermont aside from other parts of the United States and is very important to Vermont's unique beauty.

i. Having to drive further and through several miles of sprawl to enjoy a country setting significantly diminishes Mr. Horenstein's enjoyment of the Vermont countryside.

j. Additional sprawl, traffic, water pollution, and other impacts generated by the CCCH will significantly and adversely affect Mr. Horenstein's quality of life. The CCCH will cause a decline in Burlington's vibrancy, making it a less attractive place to live.

27. VERMONT PUBLIC INTEREST RESEARCH GROUP:

a. Vermont Public Interest Research Group (VPIRG) is Vermont's leading watchdog and advocacy organization. It is supported by

approximately 20,000 members, and has been in existence since 1972. VPIRG's mission is to promote and protect the health of Vermont's environment, people, and local economy. By informing and mobilizing individuals and communities across the state, VPIRG brings the voice of citizens to public policy debates that shape the future of Vermont.

b. VPIRG brings this action on behalf of itself and its adversely affected members.

c. As set forth below, VPIRG members will suffer harm if the CCCH is built.

28. FRIENDS OF THE EARTH:

a. Friends of the Earth, Inc. (FoE) is an environmental advocacy organization founded in 1969 and incorporated in the District of Columbia. FoE has approximately 20,000 members across the nation. FoE's mission is to protect the planet from environmental degradation, preserve biological, cultural and ethnic diversity, and to empower citizens to affect the quality of their environment and their lives. FoE members also work, live, own property, farm, shop and attend school in the areas affected by construction of the CCCH.

b. FoE brings this action on behalf of itself and its adversely affected members.

c. As set forth below, FoE members will suffer harm if the CCCH is built.

29. SIERRA CLUB:

a. Sierra Club, Inc. (Sierra Club) is a national, non-profit environmental and conservation organization incorporated under the laws of the State of California. The Sierra Club is dedicated to the protection of public health and the environment. The Sierra Club has more than 700,000 members nationwide, approximately 3,450 of whom live in Vermont. For many years, Sierra Club members in Vermont have advocated transportation and land use planning that improves air quality and protects public health in the Burlington area. The Sierra Club and its members have been engaged in transportation planning processes on state, regional and local government levels.

b. The Sierra Club brings this action on behalf of itself and its adversely affected members.

c. As set forth below, Sierra Club members will suffer harm if the CCCH is built.

30. CONSERVATION LAW FOUNDATION:

a. Conservation Law Foundation (CLF) is a not-for-profit corporation incorporated under the laws of the Commonwealth of Massachusetts and authorized to conduct activities in Vermont. CLF is dedicated to solving environmental problems that threaten the people, communities and natural resources of New England, including the State of Vermont. CLF has maintained an advocacy center in

Montpelier, Vermont for over a decade with full-time staff. To further CLF's goals in New England and Vermont, CLF undertakes litigation and other legal advocacy on behalf of the interests of approximately 15,000 members, including over 600 in Vermont and approximately 150 in Chittenden County. CLF also promotes public awareness, education, and citizen involvement in the conservation of Lake Champlain, its surrounding waters and tributaries, and surrounding lands.

b. CLF brings this action on behalf of itself and its adversely affected members.

c. As set forth below, CLF members will suffer harm if the CCCH is built.

31. REPRESENTATIVE MEMBERS OF PLAINTIFF ORGANIZATIONS

a. MARIE SHANKS

1. Marie Shanks resides and owns a home at 341 Metcalf Drive in Williston, Vermont. Her home is part of the Southridge neighborhood. Ms. Shanks is a member of VPIRG.

2. The CCCH right-of-way is adjacent to and runs parallel to Ms. Shanks' back yard.

3. Ms. Shanks has three children. Two of them presently attend the Allen Brook Elementary School. All three of her children will attend the Allen Brook School next year.

4. The CCCH right-of-way (Segment A-B) runs between Ms. Shanks' home and the Allen Brook School.

5. Ms. Shanks is very concerned about the CCCH's noise and air pollution impacts on the school and her home. The proximity of her home and the Allen Brook School to the CCCH means that her children will be continuously exposed to the air and noise pollution it generates.

6. Noise will adversely affect her children's learning environment. The Allen Brook classrooms are all on the side of the school facing the CCCH. The children have also planted gardens and engage in other activities between the school and the CCCH right-of-way.

7. Ms. Shanks believes that children are particularly susceptible to the harmful effects of air pollution.

8. Ms. Shanks' children who attend Allen Brook School are in programs where they explore and learn about nature in the fields and Allen Brook, adjacent to the school. These fields will be paved by the CCCH and will no longer be accessible to her children.

9. Occasionally, but on regular basis, Ms. Shanks and her children will bike or walk to school on the bike path or through fields. Ms. Shanks also runs on the path. The bike path is

approximately ¼ mile from her home and runs along the back side of the Southridge neighborhood through fields to the Allen Brook School.

10. The CCCH will separate, if not sever the Allen Brook School from Ms. Shanks' neighborhood. Ms. Shanks believes that elevating the bike path over the CCCH is unsafe and inconvenient. She does not believe that young children will be able to climb the grade on their bicycles. An elevated bike path over a highway will greatly diminish Ms. Shanks' and her children's enjoyment of the path.

11. The back of Ms. Shanks' home presently looks onto fields and trees. She and her family regularly enjoy the fields and trees for walking, sledding, cross-country skiing, snowshoeing, and other activities. They also observe wildlife including deer and foxes. Replacing the fields and trees with the CCCH will greatly diminish their use and enjoyment of these natural resources.

b. JANE AND SCOTT LURIA:

1. Jane and Scott Luria own a home and reside at 404 Lawnwood Drive in Williston, Vermont. Their home is within the Southridge neighborhood. Southridge abuts the CCCH right-of-way. They are members of VPIRG.

2. Jane Luria, RN.C is a nurse practitioner. Scott Luria, M.D. is an internist.

3. The Luria's home is approximately 1/4 of a mile from the Segment A-B right-of-way and approximately 1/2 mile from the Allen Brook Elementary School.

4. The Lurias have a daughter in second grade at the Allen Brook Elementary School.

5. Segment A-B of the CCCH will run between the Lurias' home and the Allen Brook School.

6. The Lurias are concerned about the CCCH's air and noise pollution impacts on the Allen Brook School. They are concerned that a noisy environment would impede their daughter's learning.

7. Their daughter has mild reactive airway disease. They are concerned about the effects of air pollutants on her and other children.

8. The Lurias are also concerned about the CCCH's air and noise pollution impacts on their home.

9. A bike path presently runs from Southridge neighborhood to Allen Brook School and onto Talcott Road.

10. Their daughter occasionally walks on the bike path.

11. Scott Luria uses the bike path regularly commuting to work year-round.

12. Plans for construction of the CCCH call for elevating the bike path.

13. The Lurias are concerned about the aesthetic impact of elevating the bike path. They believe an elevated bike path will be less convenient and potentially unsafe (if ramps with hairpin turns are planned).

c. BRENDAN LEONARD:

1. Brendan Leonard resides and owns a home at 336 Metcalf Drive in Williston, Vermont. Mr. Leonard is a higher education consultant and a member of VPIRG.

2. Mr. Leonard's home is within the Southridge neighborhood. His home is approximately 100 yards from the CCCH right of way. Metcalf Drive parallels the CCCH right of way.

3. Allen Brook Elementary School is approximately 200 yards from Mr. Leonard's home. The CCCH right-of-way runs between his home and Allen Brook School.

4. Mr. Leonard's daughter is in first grade at the Allen Brook School.

5. Mr. Leonard is concerned about the CCCH's impacts on the school and his daughter. He believes that noise generated by the CCCH will negatively impact the Allen Brook students' academic environment and may impede learning.

6. He is concerned about the air pollution impacts on the school, most importantly the health of its students (including his daughter), faculty, and staff.

7. Mr. Leonard is also concerned about the air and noise pollution impacts on his home. His daughter regularly plays outside at home and at school. Mr. Leonard is worried that noise and air pollution will adversely affect her all day long, whether she is at home or school.

8. Mr. Leonard's daughter walks or bikes to school on an occasional, but regular basis. She expects to walk or bike to school more frequently as she gets older. The health and safety issues associated with a large, major roadway constructed directly on and around her route to school will dramatically impact the decision as to whether to allow this practice to continue.

9. Mr. Leonard is very concerned about the safety in crossing the Highway to get to Allen Brook School. This concern would not be diminished by installation of an elevated path. An

elevated path would have its own safety risks and would be a terrible eye-sore, completely changing the serene, bucolic bike path into a concrete and iron jungle.

10. The added concentration of traffic passing by Mr. Leonard's home and his daughter's school also worries him. Placing a highway between his neighborhood and the neighborhood school (Allen Brook) adversely affects Mr. Leonard and his daughter.

11. Mr. Leonard and his daughter regularly use the bike path and fields in and around their neighborhood for recreational activity. The bike path runs through or along fields, wetlands and Allen Brook. Mr. Leonard and his daughter regularly enjoy these natural resources. Mr. Leonard believes that the CCCH will pave much of this resource and will diminish other parts of the resource through water, air, and noise pollution. The CCCH will also make the resource more difficult and less pleasant to access.

d. DUANE PETERSON:

1. Duane Peterson owns property and resides at 38 Wildwood Drive, Town of Essex, Vermont. His home is located approximately one-half mile from Segment E of the CCCH.

2. He is a member, and on the Board of Directors, of VPIRG. He is also a member of FoE, Sierra Club and CLF.

3. Mr. Peterson's home is adjacent to wetlands that drain into Alder Brook. His property is within one-half mile of Alder Brook.

4. Mr. Peterson and his young children regularly swim, canoe, and kayak on Lake Champlain and on the lower reaches of the Winooski River. They regularly use the wetland adjacent to his property and Alder Brook for recreation and observing nature. They also regularly recreate where Alder Brook flows into the Winooski.

5. Mr. Peterson believes that endangered species are integral to the ecology of the Winooski River and Lake Champlain and their tributaries. He looks for these species in these areas. He understands that threatened and endangered species are in the Lower Winooski and Lake Champlain in areas that will be affected by CCCH pollution. The loss of these species would harm Mr. Peterson's appreciation of the ecological integrity of the Lake and River.

6. Proposed Sections A and B of the CCCH will likely increase water pollution in the wetlands adjacent to Mr. Peterson's property and in Alder Brook. Water pollution will

also increase in Allen and Muddy Brooks upstream from its confluence with the Winooski River, the Winooski River, and Lake Champlain.

7. Mr. Peterson makes regular use of these wetlands and brooks, the Winooski River, and Lake Champlain at points downstream from CCCH discharges.

8. Mr. Peterson also enjoys viewing and observing birds and other wildlife around the Lake, River, Brooks, and Wetlands. Throughout the year, he often hikes, walks and enjoys points along the Lake, River, tributaries and wetlands, including the Burlington bike path, North Beach, as well as points on the lower reaches of the River such Ethan Allen Park, the Intervale and trails along the River and its tributaries in Winooski, Essex and Williston, to observe Lake, River and Wetland wildlife and scenery.

9. Mr. Peterson, an Eagle Scout, is an adult Cub Scout leader who enjoys introducing children to outdoor recreation in these areas. The increased pollution from the Highway will damage the natural environment Mr. Peterson explores with the scouts in his charge.

10. He intends to continue using these resources on a frequent and regular basis.

11. Mr. Peterson hopes that his children will grow up using these resources with neither the worry of health threats nor degradation of the resources caused by pollution. Pollution and dangerous algal blooms already cause him to limit his children's use of these resources. Further pollution will cause him to further limit his and his children's use.

12. Water quality is essential to Duane Peterson's use and enjoyment of these resources.

13. Duane Peterson believes that storm water runoff is one of the largest contributors to this pollution in the Lake, River, brooks, and wetland. He believes that it is important to reduce such pollution or his ability to use these resources will suffer, and existing concerns over the safety of these resources will heighten.

14. Further degradation to the water quality of the Lake, the River and the Wetlands from storm water discharges from the CCCH, increased development, increased traffic, and loss of open land will seriously and substantially impair Duane Peterson's ability to use and enjoy these resources.

15. Mr. Peterson often rides his bicycle to the Essex Amtrak station and then takes the CCTA bus into Burlington for work.

Other times, Mr. Peterson will drive himself into Burlington for work.

16. The roads and intersections on which Mr. Peterson bicycles, commutes and drives will bear increased traffic congestion because of the CCCH. Increased traffic congestion, the increased danger of bicycling on increasingly congested roads, and the additional time and expense associated with increased congestion will harm Mr. Peterson.

17. Mr. Peterson also enjoys the clear demarcation between town and country. He believes that this clear demarcation sets Vermont aside from other parts of the United States and is very important to Vermont's unique beauty.

18. Having to drive further and through several miles of sprawl to enjoy a country setting significantly diminishes Mr. Peterson's enjoyment of the Vermont countryside.

19. Additional sprawl, traffic, water pollution, and other impacts generated by the CCCH will significantly and adversely affect Mr. Peterson's quality of life.

e. DON DICKSON:

1. Don Dickson resides at 43 Ledgemere Street, Burlington Vermont.

2. Mr. Dickson is a member of Sierra Club and VPIRG.

3. Since about 1980, Mr. Dickson regularly bicycles from Burlington to Winooski, out Mallett's Bay Avenue to Blakely Avenue, east on Blakely and Severance Road to Suzie Wilson, winding through residential areas in the village, then out River Road (Route 117), south on N. Williston Road, west on Mountain View Avenue and Industrial Avenue, south on S. Brownell Road, and back along Dorset and Swift Street to Burlington again. This is an approximately 35-mile loop that he bicycles on a regular basis. He intends to continue bicycling this route at least once or twice a year.

4. Any increase in traffic and commercial or residential development along that route will make it harder and less safe and enjoyable for Mr. Dickson to continue use of this traditional bicycle route.

5. By inducing additional growth in the vicinity of its interchanges, the CCCH will increase traffic congestion or the speed at which cars drive in the vicinity of his bicycle route. Mr. Dickson has noticed that traffic is increasingly heavy, even on weekends, cars are going faster, and some motorists are disrespectful of bicyclists and he is very concerned that the CCCH will further exacerbate this problem.

6. During the last several years, Mr. Dickson has hiked with his dog and taken photographs in the wooded areas between Mountain View Road and the railroad tracks where he sees deer, wild turkeys, and mink. He also hikes and takes photographs in the wooded area west of the intersection of Route 2A and Suzie Wilson Road in Essex, as well as the area west of Colchester High School. He intends to continue hiking in these areas. If it is built, the CCCH will go through all of these wooded places and adversely impact his use and enjoyment of these areas.

7. Many times, Don Dickson has canoed from Winooski down the Winooski River to Lake Champlain, with his children and with friends, and he intends to continue doing so. Don Dickson and his family and friends swim at the beaches of Lake Champlain and paddle their canoes along the shore and out into the broad lake. They intend to continue doing so.

8. Any reduction in water quality of the river or the lake will reduce his enjoyment of that activity.

9. A vibrant Downtown Burlington is very important to Mr. Dickson. He lives and works in downtown Burlington, and he and his family enjoy and benefit from shopping and cultural amenities that are located in Downtown Burlington.

10. The CCCH will result in a significant amount of land becoming subject to induced growth and relocation pressures, or "sprawl."

11. Sprawl significantly diminishes Mr. Dickson's use and enjoyment of Downtown Burlington. Sprawl will result in further dispersal of cultural amenities and businesses from the Downtown to outlying areas, particularly including theaters and restaurants.

12. Driving to outlying areas is time consuming and expensive and significantly reduces Mr. Dickson's benefit and enjoyment of living in Burlington.

13. The loss of additional and significant amounts of land to sprawl will weaken Downtown Burlington, diminish in-town opportunities, and will require more use of a car. Additional sprawl will result in the additional shift of businesses from Downtown Burlington to outlying areas and require Mr. Dickson to spend more time and money driving.

14. Construction of the CCCH will also add significantly to traffic congestion on roads used by Mr. Dickson and his family, including Interstate 89, Route 15, Routes 2 and 2a, Route 117, and other roads.

15. Mr. Dickson also enjoys the clear demarcation between town and country. He believes that this clear demarcation sets Vermont apart from other parts of the United States and is very important to Vermont's unique beauty.

16. Having to drive further and through several miles of sprawl to enjoy a country setting significantly diminishes Mr. Dickson's enjoyment of the Vermont countryside.

17. Additional sprawl, water pollution, traffic, and other impacts generated by the CCCH will significantly and adversely affect Mr. Dickson's quality of life. The CCCH will cause a decline in Burlington's vibrancy, making it a less attractive place to live for Mr. Dickson and his family.

f. STEPHEN BOYAN

1. Stephen Boyan owns property and resides at 200 Lake Street, in Burlington, Vermont. His home is adjacent to Waterfront Park in Burlington.

2. Stephen Boyan is a member of CLF.

3. Mr. Boyan lives a very short distance from the Lake and regularly swims, wades, and sails at various points in the Lake. He uses and enjoys the Lake and the Winooski River almost every day. He intends to continue using and enjoying the Lake and the River for the indefinite future.

4. Mr. Boyan also enjoys viewing and observing the natural beauty, birds and other wildlife around the Lake and River. He frequently walks, bikes, roller blades, and cross-country skis along the Burlington Bike Path. He enjoys points along the Lake from Waterfront Park to the Winooski River Delta, as well as points on the lower reaches of the River such as Ethan Allen Park and the Intervale, to observe and enjoy the scenic beauty and diverse wildlife of these resources.

5. Mr. Boyan believes that endangered species are integral to the ecology of the Winooski River and Lake Champlain. He understands that threatened and endangered species are in the Lower Winooski and Lake Champlain in areas that will be affected by CCCH pollution. The loss of these species would harm Mr. Boyan's appreciation of the ecological integrity of the Lake and River.

6. Mr. Boyan believes that portions of the Lake and River he uses and enjoys are polluted. He is very concerned that additional pollution from the CCCH will further pollute the River and Lake.

7. Many of the points on the Lake and River enjoyed by Mr. Boyan are downstream from the CCCH discharges of

stormwater and other pollutants and in areas that will be affected by these discharges.

8. Water quality is essential to Mr. Boyans's use and enjoyment of the Lake and the River.

9. Further degradation to the Lake and the River from stormwater and other pollution from the CCCH will seriously and substantially impair his ability to use and enjoy these precious water resources. Further degradation of water quality in these water resources caused by discharges from the CCCH will increase beach closings and cause Mr. Boyan to swim in the Lake less. Further pollution will also diminish the scenic and ecological value of the Lake and River, and make these areas less interesting for Mr. Boyan to observe and enjoy wildlife and natural beauty.

10. Mr. Boyan's dog swims in the Lake on an almost daily basis. More algae blooms will cause Mr. Boyan further worry about his and his dog's use of the Lake and cause him to be significantly less likely to use the water.

11. Any further degradation of the water quality of the Lake and the River caused by discharges of pollutants from the CCCH would cause Mr. Boyan substantial injury by limiting and impairing his use and enjoyment of these water resources.

12. A vibrant Downtown Burlington is very important to Mr. Boyan. He enjoys and benefits from shopping and conducting business in Downtown Burlington.

13. The CCCH will result in a significant amount of land becoming subject to sprawl and contribute to the increased dispersal of population and business in Chittenden County. This will likely diminish Mr. Boyan's use and enjoyment of Downtown Burlington, as he will need to drive more and longer distances for both business and personal reasons.

14. Sprawl can also result in dispersal of cultural amenities that may reduce the long-term viability of these amenities in downtown Burlington. For example, the recently built Essex movie theaters are located close to CCCH exits in Essex. Additional sprawl will also likely result in the additional shift of businesses from Downtown Burlington to outlying areas and require Mr. Boyan to spend more time and money driving.

15. Construction of the CCCH will also add significantly to traffic congestion on roads used by Mr. Boyan, including Interstate 89 and Route 15.

16. This additional congestion will likely add to the time and expense incurred by Mr. Boyan to transact business and shop outside of the Downtown area.

g. STEVE CROWLEY

1. Steve Crowley owns property and resides at 12 Pleasant Avenue, South Burlington, Vermont. His property and home are located approximately one quarter mile from Red Rocks Park and a few hundreds yards from Lake Champlain.

2. Mr. Crowley is a member of Sierra Club and Friends of the Earth.

3. Mr. Crowley and his children regularly swim, canoe, and kayak on the Lake and on the lower reaches of the Winooski River.

4. The CCCH will likely increase water pollution in the Winooski River and Lake Champlain.

5. Several parts of the Winooski River and Lake Champlain used by Mr. Crowley are downstream from CCCH discharges.

6. Mr. Crowley also enjoys viewing and observing birds and other wildlife around the Lake, Winooski River and their tributaries and wetlands. Throughout the year, he and his children often hike, walk and enjoy points along the Lake, River, tributaries and wetlands, including the Burlington bike path, North Beach, as well as points on the lower reaches of the River such as Ethan Allen Park, the Intervale and trails along the

River and its tributaries in Winooski, Essex and Williston, to observe Lake, River and wetland wildlife and scenery.

7. Mr. Crowley believes that endangered species are integral to the ecology of the Winooski River and Lake Champlain and their tributaries. He looks for these species in these areas. He understands that threatened and endangered species are in the Lower Winooski and Lake Champlain in areas that will be affected by CCCH pollution. The loss of these species would harm Mr. Crowley's appreciation of the ecological integrity of the Lake and River.

8. He intends to continue using these resources on a frequent and regular basis.

9. Mr. Crowley hopes that his children will grow up using these resources with neither the worry of health threats nor degradation of the resources used caused by pollution. Pollution and dangerous algae blooms already cause him to limit his children's use of these resources. Further pollution will cause him to further limit his and his children's use.

10. Water quality is essential to Mr. Crowley's use and enjoyment of these resources.

11. Mr. Crowley believes that stormwater runoff is one of the largest contributors to pollution in the Lake, River, brooks, and

wetland. He believes that it is important to reduce such pollution or his ability to use these resources will suffer, and existing concerns over the safety of these resources will heighten.

12. Further degradation to the water quality of the Lake, the River and the Wetlands from storm water discharges from the CCCH, increased development, increased traffic, and loss of open land will seriously and substantially impair Mr. Crowley's ability to use and enjoy these resources.

13. A vibrant Downtown Burlington is very important to Mr. Crowley. He enjoys and benefits from shopping and cultural amenities that are located in Downtown Burlington.

14. The CCCH will result in a significant amount of land becoming subject to induced growth pressures. "Sprawl" is another word for "induced growth."

15. Sprawl significantly diminishes Mr. Crowley's use and enjoyment of Downtown Burlington. Sprawl will result in further dispersal of cultural amenities and businesses from the Downtown area to outlying areas.

16. Driving to outlying areas is time consuming and expensive and significantly reduces Mr. Crowley's benefit and enjoyment of living in Burlington.

17. The loss of additional and significant amounts of land to sprawl will weaken Downtown Burlington, diminish in-town opportunities, and will require more use of a car. Additional sprawl will result in the additional shift of businesses from Downtown Burlington to outlying areas and require Mr. Crowley to spend more time and money driving.

18. Construction of the CCCH will also add significantly to traffic congestion on roads used by Mr. Crowley, including Interstate 89 and Route 15.

19. Mr. Crowley also enjoys the clear demarcation between town and country. He believes that this clear demarcation sets Vermont apart from other parts of the United States and is very important to Vermont's unique beauty.

20. Having to drive further and through several miles of sprawl to enjoy a country setting significantly diminishes Mr. Crowley's enjoyment of the Vermont countryside.

21. Additional sprawl, traffic, water pollution, and other impacts generated by the CCCH will significantly and adversely affect Mr. Crowley's quality of life.

h. JEFFREY MEYERS

1. Jeffrey Meyers resides at 5 Harborwatch, Burlington, Vermont. His home is approximately two hundred yards from

Lake Champlain, near Oakledge Park. Mr. Meyers is a member of FoE and CLF.

2. The CCCH will discharge stormwater and other pollutants into Allen Brook, the Winooski River, and tributaries at various points in Williston and Essex, Vermont. Discharges will flow downstream from Allen Brook, joining Muddy Brook just prior to its confluence with the Winooski River, and then flow west into the Lake. Discharges will also flow from the Winooski River and unnamed tributaries into the Lake.

3. Mr. Meyers lives a very short distance from the Lake and regularly swims, kayaks, canoes and fishes at various points in the Lake and on the Winooski River. He particularly enjoys kayaking at the Winooski River Delta and the lower reaches of the River and has led many group kayak tours there.

4. Mr. Meyers also regularly fishes along the Winooski River Delta and Mallett's Bay for bass, walleye, pike and perch. He fishes the lower reaches of the Winooski River for trout and smallmouth bass. Currently, the lower reaches of the River provide high quality fishing areas.

5. Many, if not most points in the Lake and River used by Mr. Meyers are downstream from where the CCCH would discharge.

6. Mr. Meyers intends to continue using and enjoying the Lake and the River. Such use of the Lake and the River is an important reason why Mr. Meyers chooses to live near the Lake.

7. Mr. Meyers is a wildlife enthusiast. Throughout the year, he frequently visits the Winooski Delta, Colchester Point, and outer and inner Mallett's Bay to study natural history and Lake and River Delta ecology, and to bird watch. The River Delta is of particular interest to Mr. Meyers as waterfowl often gather there during the year and times of migration. Many of these waterfowl are diving species, which prefer clean water and depend on a healthy ecosystem with high water quality.

8. Several times a year Mr. Meyers visits Allen Brook to hike and wade along its shores and study and enjoy its ecology. He has led citizen groups and student groups from the University of Vermont and the Winooski Watershed Association on ecology tours of Allen Brook where they have studied, enjoyed and observed the Brook's ecology. His use of Allen Brook includes the entire length of the Brook, from its confluence with the Winooski River to its genesis in the Mud Pond area in Williston. Studying and recreating along Allen Brook has been an interest of Mr. Meyers, and he plans to continue to study, observe and enjoy the Brook.

9. Mr. Meyers believes that many species, including endangered species, are integral to the ecology of these brooks, the Winooski River and Lake Champlain. He looks for many such species in the Winooski River, including Eastern Sand Darter, various unionid mussels, and various amphibian species, including mudpuppies.

10. Water quality is essential to Mr. Meyers' use and enjoyment of the Lake, the River and Allen Brook. He understands that these waters are already polluted. Algae blooms in the Lake, periodic beach closings and health warnings not to swim in areas of the Lake in Chittenden County all inhibit Mr. Meyers' use of the Lake. Allen Brook is already sadly and very noticeably degraded in places from development and runoff. The areas of the Brook that are still enjoyable and valuable to study and observe have been diminishing over the years.

11. Mr. Meyers often brings his dog with him when he uses the Lake and the River. His dog enjoys the water and likes to swim. Dogs have died from ingesting blue-green algae in the Lake. He is concerned that his dog could become ill or die from ingesting such poisonous blue-green algae.

12. Mr. Meyers is concerned that CCCH discharges will further pollute these resources. Further pollution will inhibit and limit his use of these resources and significantly diminish his use and enjoyment of the resources. Further pollution will also diminish the ecological and natural history values of the Lake and River, and make these areas less desirable places to recreate and observe and study nature. Further pollution will result in a further lowering of water quality in these water resources, presenting a direct and immediate threat of injury to his use and enjoyment of these water resources.

13. A vibrant Downtown Burlington is very important to Mr. Meyers. He enjoys and benefits from shopping and conducting business in Downtown Burlington which is very close to his home and can be reached by walking or biking.

14. The CCCH will result in a significant amount of land becoming subject to sprawl or induced growth creating relocation pressures and contributing to the increased dispersal of population and businesses in Chittenden County.

15. This will diminish Mr. Meyers' use and enjoyment of Downtown Burlington as Burlington businesses struggle in competition with new sprawl development that will arise as a result of the CCCH. Mr. Meyers is very concerned about the

potential economic impacts that will occur for Burlington businesses as a result of the CCCH.

16. The loss of additional amounts of land to sprawl will weaken Downtown Burlington, diminish in-town opportunities, and require more use of the car. Additional sprawl will also result in the additional shift of businesses from Downtown Burlington to outlying areas and require Mr. Meyers to spend more time and money driving.

17. Sprawl-related economic impacts would also reduce the long-term viability of cultural amenities in downtown Burlington.

18. Loss of cultural amenities in Burlington would negatively impact his quality of life and necessitate his moving to another area or driving farther to distant areas in search of other cultural amenities. Driving to distant areas would be time consuming and expensive.

19. Construction of the CCCH will also add significantly to traffic congestion on roads used by Mr. Meyers, including Interstate 89, Route 15 and many intersections on other roads that will receive increased—not decreased—volume and congestion from the CCCH.

20. This additional congestion will likely add to the time and expense incurred by Mr. Meyers to transact business and shop outside of the Downtown area.

21. Mr. Meyers also enjoys the clear demarcation between town and country. He believes that this clear demarcation sets Vermont aside from other parts of the United States and is very important to Vermont's unique beauty. Mr. Meyers lives in Vermont, in large part, because of this attribute. Mr. Meyers is concerned that the CCCH will contribute significantly to the loss of this unique attribute.

i. TAMMY NEWMARK

1. Tammy Newmark resides at 5 Harborwatch, Burlington, Vermont. Her home is approximately two hundred yards from Lake Champlain, near Oakledge Park. Ms. Newmark is a member of CLF.

2. The CCCH will discharge storm water and other pollutants into Allen Brook, the Winooski River, and tributaries at various points in Williston and Essex, Vermont. Discharges will flow downstream from Allen Brook, joining Muddy Brook just prior to its confluence with the Winooski River, and then flow west into the Lake. Discharges will also flow from the Winooski River and unnamed tributaries into the Lake.

3. Ms. Newmark lives a very short distance from the Lake and regularly swims, kayaks, canoes and fishes at various points in the Lake and on the River. She particularly enjoys using the bike path up to the Winooski River Delta and to the causeway.

4. Many, if not most points in the Lake and River used by Ms. Newmark are downstream from where the CCCH would discharge.

5. Ms. Newmark intends to continue using and enjoying the Lake and the River. Such use of the Lake and the River is an important reason why Ms. Newmark chooses to live near the Lake and near Downtown Burlington.

6. Ms. Newmark is a wildlife enthusiast. Throughout the year, she visits the Winooski Delta and Colchester Point to bird watch. The River Delta is of particular interest to Ms. Newmark as waterfowl often gather there during the year and times of migration. Many of these waterfowl are diving species, which prefer clean water and depend on a healthy ecosystem with high water quality.

7. Water quality is essential to Ms. Newmark's use and enjoyment of the Lake, the River and Allen Brook. She understands that these waters are already polluted. Algae blooms in the Lake, periodic beach closings and health warnings

not to swim in areas of the Lake in Chittenden County all inhibit Ms. Newmark's use of the Lake. Allen Brook is already sadly and very noticeably degraded in places from development and runoff. The areas of the Brook that are still enjoyable and valuable to study and observe have been diminishing over the years.

8. Ms. Newmark often brings her dog with her when she uses the Lake and the River. Her dog enjoys the water and likes to swim. Dogs have died from eating blue-green algae in the Lake. She is concerned that her dog could become ill or die from eating such poisonous blue-green algae.

9. Ms. Newmark is concerned that CCCH discharges will further pollute these resources. Further pollution will inhibit and limit her use of these resources and significantly diminish her use and enjoyment of the resources. Further pollution will also diminish the ecological and natural history value of the Lake and River, and make these areas less interesting for Ms. Newmark to observe nature, study ecology and bird watch. Further pollution will result in a further lowering of water quality in these water resources, presenting a direct and immediate threat of injury to her use and enjoyment of these water resources.

10. A vibrant Downtown Burlington is very important to Ms. Newmark. She enjoys and benefits from shopping and conducting business in Downtown Burlington.

11. The CCCH will result in a significant amount of land becoming subject to sprawl or induced growth and relocation pressures and contribute to the increased dispersal of population and businesses in Chittenden County.

12. This will diminish Ms. Newmark's use and enjoyment of Downtown Burlington, as she will need to drive more and longer distances for both business and personal reasons.

13. Sprawl also results in dispersal of cultural amenities that may reduce the long-term viability of these amenities in downtown Burlington.

14. Driving to outlying areas is time consuming and expensive.

15. The loss of additional amounts of land to sprawl will weaken Downtown Burlington, diminish in-town opportunities, and require more use of the car. Additional sprawl will also result in the additional shift of businesses from Downtown Burlington to outlying areas and require Ms. Newmark to spend more time and money driving.

16. Construction of the CCCH will also add significantly to traffic congestion on roads used by Ms. Newmark, including Interstate 89.

17. This additional congestion will likely add to the time and expense incurred by Ms. Newmark to transact business and shop outside of the Downtown area.

18. Ms. Newmark also enjoys the clear demarcation between town and country. She believes that this clear demarcation sets Vermont aside from other parts of the United States and is very important to Vermont's unique beauty. Ms. Newmark was drawn to Vermont, in large part, because of this attribute. Ms. Newmark is concerned that the CCCH will contribute significantly to the loss of this unique attribute.

j. ADDITIONAL REPRESENTATIVE MEMBERS

1. VPIRG, FoE, Sierra Club, and CLF all have numerous other members who are similarly situated and will be similarly harmed by construction of the CCCH.

## STATUTORY AND REGULATORY FRAMEWORK

### A. NATIONAL ENVIRONMENTAL POLICY ACT

32. The National Environmental Policy Act is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. NEPA requires all federal agencies to identify and consider the environmental impacts and to

consider alternatives and mitigating measures that will avoid or reduce such impacts before taking action to assist or approve a project that may significantly affect the environment. To these ends, Section 102(2)(C) of the Act declares:

> The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall – . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on – (i) the environmental impact of the proposed action . . . ."

42 U.S.C. § 4332(2)(C).

33. This mandate is intended to inject environmental considerations into the federal agency's decision-making process and to inform the public that the agency took a hard look at all environmental concerns *prior* to making a decision to proceed with a project.

34. NEPA also created the Council on Environmental Quality (CEQ), which has issued regulations guiding agencies' compliance with NEPA. 42 U.S.C. §4341 *et seq.*; 40 C.F.R. Part 1500. These regulations clearly define what constitutes agency action and the process for determining whether the action or program significantly affects the quality of the human environment.

35. CEQ regulations mandate that every agency comply with NEPA "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6.

36. CEQ regulations require federal agencies to adopt supplemental procedures to ensure that agency's compliance with NEPA. 40 C.F.R. § 1507.3. Any agency regulations must comply with CEQ regulations. *Id.* FHWA's NEPA regulations are at 23 C.F.R. Part 771.

37. CEQ regulations provide that an agency's decision to provide federal assistance to a specific project is a major federal action.

38. CEQ regulations require that an agency prepare an Environmental Assessment (EA) to determine whether an action may significantly affect the environment, and if so, prepare an Environmental Impact Statement (EIS), or if not, a finding of no significant impact (FONSI). 40 C.F.R. §§ 1501.3, 1501.4, 1508.9.

39. An evaluation of whether an impact is "significant" requires consideration of both the "context" and "intensity" of the action. 40 C.F.R. § 1508.27

40. Under CEQ regulations, consideration of the "context" of an action means that "the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27. Significance of the action can vary with the setting of the proposed action. *Id.*

41. The "intensity" of the action under CEQ regulations refers to the severity of the action's impact. 40 C.F.R. § 1508.27. An evaluation of the intensity of the action must consider, among other things, "the degree to

which the effects on the quality of the human environment are likely to be highly controversial," and "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." *Id.*

42. In preparing an EA or EIS, an agency must also consider direct and indirect, and cumulative impacts. *See* 40 C.F.R. §§ 1502.16, 1508.8, 1508.9, 1508.27. "Cumulative impact is the impact on the environment which results from the incremental impact of a project when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.8. Indirect impacts are those caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.

43. An EA or EIS must also discuss environmentally sounder alternatives to the program or project -- including a "no-action" alternative -- and mitigation of any environmental impacts. 40 C.F.R. §§ 1502.14, 1508.9; 1502.16.

44. An EA or EIS must provide a "full and fair discussion of significant environmental impacts." 40 C.F.R. §1502.1.

45. CEQ regulations require an agency to prepare a public record of decision which states whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not. 40 C.F.R. §1505.2(c).

46. CEQ regulations require full public notice, review, and comment on environmental impact statements and environmental assessments and notice to the public of the availability of NEPA-related environmental documents. 40 C.F.R. § 1502.19, 1503.1, 1506.6.

47. FHWA regulations implementing NEPA require the FHWA to give consideration to mitigation measures to avoid or minimize environmental harm. Proposed mitigation measures must be included in the environmental impact statement or EA and the ROD. 23 C.F.R §§ 771.126 & 777.127.

48. A federal agency may adopt an EIS prepared by a state only if, *inter alia*, the federal agency furnished guidance and participated in the EIS preparation and the federal agency independently evaluates the EIS prior to its approval and adoption. 42 U.S.C. § 4332(D).

49. An agency must prepare a Supplemental EIS when, *inter alia*, there have been substantial changes to the project, or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9. FWHA regulations also require supplementation of an EIS under similar circumstances. 23 C.F.R. § 771.130.

50. An agency cannot segment a project's environmental review to make its overall impacts appear insignificant. "Significance cannot be avoided by terming an action temporary or by breaking it down into small component

parts." 40 C.F.R. § 1508.27(b)(7). Connected or interrelated actions must be discussed in the same EIS. 40 C.F.R. § 1508.25(a)(1) & (3).

51. CEQ regulations define actions to be "connected" if they are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1).

52. FHWA regulations prohibit segmentation of a project's environmental impacts unless the project segment, *inter alia*, has "independent utility or independent significance, i.e. is usable and a reasonable expenditure even if no additional transportation improvements in the area are made." 23 C.F.R. 771.111(f).

53. An EA or EIS must also contain a brief statement of need for the proposal, 40 CFR § 1508.9(b) and a list of preparers, 40 C.F.R. § 1502.17.

54. An EA or EIS must also assure professional and scientific integrity. 40 C.F.R. § 1502.24. Likewise, any cost-benefit analysis must fully assess and weigh all environmental impacts. 40 C.F.R. § 1502.23

**B. DEPARTMENT OF TRANSPORTATION ACT**

55. Section 4(f) of the Department of Transportation Act, provides, in pertinent part, that the Secretary of Transportation:

> shall not approve any program or project . . . which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent

> alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 303(c); 23 U.S.C. § 138.

56. According to FHWA regulations implementing Section 4(f), "[a]ny use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study." 23 C.F.R. § 771.135(b). The required "evaluation" is called a Section 4(f) evaluation, and culminates in a Section 4(f) determination. *Id.*

57. The Section 4(f) evaluation, and the subsequent Section 4(f) determination, constitutes FHWA's decision on whether a proposed highway project should be allowed to proceed, despite the fact that it will "use" Section 4(f) resources.

58. Information supporting FHWA's determination to "use" Section 4(f) resources "must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes." 23 C.F.R. § 771.135(a)(2).

59. Under FHWA regulations "use" may occur either (1) when Section 4(f) property is permanently incorporated into the project, or (2) when the project "constructively" uses the Section 4(f) property. 23 C.F.R. § 771.135(p)(1). Constructive use occurs "when the transportation project does not incorporate

land from a section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired." 23 C.F.R. § 771.135(p)(2).

## C. FEDERAL-AID HIGHWAY ACT

60. Section 109(h) of the Federal-Aid Highway Act (FAHA) provides in pertinent part that the Secretary of Transportation must:

> assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:
>
> > (1) air, noise, and water pollution;
> > (2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;
> > (3) adverse employment effects, and tax and property value losses;
> > (4) injurious displacement of people, businesses and farms; and
> > (5) disruption of desirable community and regional growth.

23 U.S.C. §109(h).

61. FHWA regulations promulgated pursuant to §109(h) of the FAHA are located at 23 U.S.C part 771. These regulations incorporate consideration of the criteria established in §109(h) of the FAHA into the FHWA procedures for NEPA compliance, also located at part 771. 23 U.S.C. § 771.101.

62. Section 109(i) of the FAHA also requires the Secretary to "develop and promulgate standards for noise levels compatible with different land uses" and prohibits the Secretary from approving:

> plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he determines that such plans and specifications include adequate measures to implement the appropriate noise level standards.

23 U.S.C. §109(i).

63. Regulations promulgated pursuant to §109(i) of the FAHA, require FHWA to:

> determine and analyze expected traffic noise impacts and alternative noise abatement measures to mitigate these impacts, giving weight to the benefits and cost of abatement, and to the overall social, economic and environmental effects.

23 C.F.R. § 772.9(a).

64. FHWA traffic noise analysis must evaluate the noise impacts for each alternative and shall include:

> (1) Identification of existing activities, developed lands, and undeveloped lands for which development is planned, designed and programmed, which may be affected by noise from the highway;
>
> (2) Prediction of traffic noise levels;
>
> (3) Determination of existing noise levels;
>
> (4) Determination of traffic noise impacts; and
>
> (5) Examination and evaluation of alternative noise abatement measures for reducing or eliminating the noise impacts.

23 C.F.R. § 772.9(b).

65. Part 772 also requires that FHWA consider "land uses or activities which may be affected by noise from construction of the project." 23 C.F.R. § 772.19(a). This identification must be performed "during the project development studies." *Id.*

66. In determining noise impacts "primary consideration is to be given to exterior uses," however:

> [i]n those situations where there are no exterior activities to be affected by the traffic noise, or where the exterior activities are far from or physically shielded from the roadway in a manner that prevents an impact on exterior activities, the interior criterion shall be used as the basis of determining noise impacts.

23 C.F.R. §772.11(a)&(b).

67. When noise impacts are identified "abatement measures . . . must be considered." 23 C.F.R. §772.11(c)

68. The FAHA also establishes procedures for public involvement throughout the development and evaluation of a proposed highway project. 23 U.S.C. §128. Section 128 of FAHA requires that:

> Any State transportation department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.

23 U.S.C. §128.

69. FHWA regulations implementing §128 require that each State has in place procedures to carry out a public involvement/public hearing program, which must provide, *inter alia*, both for "coordination of public involvement activities and public hearings with the entire NEPA process," as well as "early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts. . ." 23 U.S.C §771.111(h).

## FACTS

70. The CCCH is proposed as a 16.7-mile, four-lane limited access highway that would extend northwest from I-89 in Williston through Essex to Vermont Route 127 in Colchester.

71. The CCCH is a VTrans project that will utilize federal funding for design, right-of-way and construction. The CCCH was proposed as a demonstration project by Act of Congress in 1982. In 1986, the State of Vermont took responsibility for the CCCH and accepted it as part of the state highway system.

72. On May 9, 2003 and again on August 15, 2003, the defendants described the current status of the CCCH project as follows:

> The CCCH is designed as an integrated highway system, with segments of the highway being constructed in phases.
>
> * * *

> When constructed, the CCCH will be a limited access highway adjacent to Burlington, Vermont. The highway will be 15.8 miles in length, with the project affected area creating a 16.7-mile corridor. The highway will connect to I-89 in Williston, pass northwest through Essex, turn west and connect with I-89 in Colchester, and then terminate at Vermont 127, north of the Heineberg bridge in Colchester.
>
> The CCCH is being designed in and constructed in segments: Segment A-B, Segment C-F, Segment G-H, and Segment I-J. Each segment is to be, when fully constructed, a four-lane highway. Construction of Segment A-B, a 3.8-mile segment located between I-89 in Williston and VT 117 in Essex, has not yet occurred, but is proposed for 2003. Segment A-B is planned for initial construction with four lanes [for segment A], then two lanes and a climbing lane [for segment B].

Revised EA/Reevaluation at p. I-3 and I-4.

73. A portion of CCCH known as "Segment C-F" has been partially constructed and opened in 1993 as a two-lane highway with a four-lane right-of-way. Segment C-F is a 4.5 mile segment located between Routes 117 and 2A in Essex.

74. Segment C-F is proposed as a four-lane highway and construction of the additional two lanes is proposed for a later date when, and if, funds are made available.

75. Construction of Segments G-H and I-J are also proposed for a later date when, and if, funding is available.

76. Funding for expansion of C-F and for construction of Segments G-H and I-J has not been identified.

77. Segments C-F may never be expanded. Segments G-H and I-J may never be constructed.

78. The Defendants intend to commence construction of Segment A-B in the spring of 2004. Construction was originally scheduled to commence in 2003.

79. Segment A-B is a 3.8-mile highway from I-89 in Williston to Route 117 in Essex. Part of this segment will be four lanes. The remainder will be a two-lane highway with a climbing lane.

80. The federal funding of the CCCH is a major federal action.

NEPA Documentation and Process

81. On December 14, 1983, VTrans gave notice of its intent to prepare an environmental impact statement for the CCCH. 48 F.R. 55663 (12/14/83).

82. The CCCH Final Environmental Impact Statement (FEIS) was prepared by VTrans. VTrans published the FEIS on August 29, 1986.

83. Cooperating agencies listed in the FEIS are: U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, and U.S. Environmental Protection Agency.

84. The FEIS was prepared by VTrans without the oversight of FHWA.

85. No FHWA personnel or officials are named in the "List of Preparers" (Chapter 15) of the 1986 FEIS.

86. FHWA personnel did not participate in preparing responses to public comments on the 1986 FEIS.

87. The FHWA did not approve the 1986 FEIS when it was issued by the State of Vermont.

88. FHWA did not sign the cover page of the 1986 FEIS when VTrans issued it.

89. In 1986, VTrans issued a Record of Decision concluding that the CCCH should be built.

90. FWHA did not sign the 1986 Record of Decision.

91. In 1999, the FEIS was re-evaluated for Segment A-B. The 1999 re-evaluation was not published in the Federal Register and was not put out for public comment.

92. On July 20, 2002 the FHWA published in the Burlington Free Press a Notice of Adoption relative to FHWA's adoption of the 1986 CCCH.

93. FHWA did not publish a Notice of Adoption in the Federal Register.

94. The FHWA did not independently evaluate the full 1986 FEIS prior to adopting it.

95. FHWA made no determination that the 1986 FEIS complied with FHWA NEPA requirements and procedures prior to adopting the 1986 FEIS.

96. On August 9, 2002, an Environmental Assessment/Re-Evaluation of the 1986 FEIS was issued for public comment. The Re-Evaluation focuses on Segments A-F. It is entitled "Chittenden County Circumferential Highway Reevaluation of the 1986 FEIS Segments A-F."

97. Segment C-F is already built. Further construction and capacity expansion of Segment C-F has not been funded and is not proposed for 2004. The EA/Re-evaluation does not fully re-evaluate the impacts that resulted from construction of Segment C-F, nor does it fully assess the impacts of expanding Segment C-F to four lanes.

98. The purpose of EA/Re-evaluation, as conducted by FHWA, was not to independently evaluate the FEIS. Its purpose was to identify any project-induced impact changes that may have occurred since the publication of the 1986 CCCH FEIS that might require a Supplemental Environmental Impact Statement (SEIS) to be prepared.

99. The EA/Re-evaluation does not critique, change, or provide any explanation for adopting the 1986 FEIS.

100. In the EA/Re-evaluation, FHWA and VTrans concluded that there was no new information concerning the CCCH that warranted an SEIS.

101. Public entities, citizens, and citizens' groups, including the Plaintiffs, submitted comments on the EA/Re-evaluation, and requested preparation of a full SEIS.

102. On September 6, 2002, the U.S. Environmental Protection Agency (EPA) submitted comments on the EA/Re-evaluation

103. EPA's comments highlighted numerous problems with the CCCH EA/RE.

104. Under CEQ regulations, EPA has a supervisory role in ensuring other federal agencies comply with NEPA, prepare adequate environmental reviews of major projects, and follow NEPA's public participation and public disclosure requirements. 40 C.F.R. § 1506.9.

105. EPA found that the CCCH EA/RE was deficient in its consideration of, among other things, the secondary environmental impacts of induced growth; the ability of transit, transportation demand management (TDM) measures, and transportation system management (TSM) measures to meet project objectives; and the project's impacts on impaired waters.

106. EPA's comments raised substantial and serious questions about the adequacy of the 1986 FEIS, particularly with respect to its consideration of alternatives.

107. For example, EPA noted that:

> [t]he original EIS for [the CCCH] was prepared 16 years ago. Since then, our understanding of the potential for secondary environmental impacts has improved. At the same time, alternatives appear to be available now (transit,TDM/TSM) that were not feasible then.

108. In its September 6, 2002 letter, EPA concluded "that a supplemental EIS would best inform the public on the most cost-effective and environmentally-sound manner in which to improve the transportation system."

109. FHWA did not, and has not, prepared an SEIS.

110. On September 18, 2002, President Bush signed Executive Order 13274, on Environmental Stewardship and Transportation Infrastructure Project Reviews. E.O. 13274 was enacted to provide for "accelerated environmental review" of transportation projects.

111. On or about October 31, 2002, then-candidate for Governor of Vermont James Douglas announced that President Bush's administration had placed the CCCH on the list of seven initial projects that would receive accelerated environmental review under E.O. 13274.

112. Candidate Douglas explained that a request he made to Vice-President Cheney resulted in the CCCH being placed on a list of special highways to go through a streamlined environmental review process.

113. On November 19, 2002, FHWA met with representatives of EPA to discuss the accelerated environmental review process.

114. Plaintiffs CLF and FoE requested to attend the November 19, 2002 meeting and future meetings regarding the Highway's accelerated environmental review in a letter to EPA dated October 8, 2002. CLF and FoE were denied access to the November 19, 2002 meeting and other meetings. Other members of the public, including representatives of the towns of Williston and Essex were invited and did attend the November 19, 2002 meeting.

115. Over the six-month period from November 2002 to April 2003 FHWA and EPA discussed FHWA's proposals to perform limited revised analysis of the CCCH project.

116. FHWA did perform limited additional analysis but did not address all of EPA's concerns.

117. A revised EA/Re-evaluation was issued on May 9, 2003 (REA) by FHWA and VTrans. The REA included new information on induced growth. In the REA, FHWA and VTrans again concluded that there was no new information concerning Segments A-F of the CCCH that warranted an SEIS.

118. Public entities, citizens, and citizens' groups, including the Plaintiffs, again submitted comments on the REA, and again asked for preparation of an SEIS.

119. EPA also submitted additional comments on the REA. Notably, EPA did not withdraw its recommendation for preparation of a full SEIS.

120. A final revision to the REA was issued by FHWA and VTrans on August 15, 2003 (FREA).

121. A Record of Decision (ROD) to build Segments A-B was issued on August 22, 2003. The ROD authorizes expenditure of federal funds to construct Segments A-B of the CCCH.

122. Neither the REA, FREA, nor the August 22, 2003 ROD provides FHWA's independent evaluation of the full 1986 FEIS.

Threatened and Endangered Species

123. NEPA requires FHWA to consider the impact of the construction of Segment A-B on federal and state-listed threatened and endangered species.

124. The 1986 FEIS concludes that: "[n]o wildlife species on either federal or state lists of threatened or endangered species were sighted during field observations . . . none of the species on current federal or state lists are found in the corridor."

125. This conclusion is based entirely on field observations in 1984 and a letter from U.S. Fish and Wildlife, dated June 7, 1985, confirming that except for transient individuals, no federally listed or proposed species under FWS jurisdiction are known to exist in the CCCH "impact area."

126. The FREA relies on the 1986 FEIS assessment of impacts to endangered or threatened species:

> There are no identified federal or state, threatened and endangered species located within areas impacted by construction of segments A-F. As set forth in the 1986 CCCH FEIS, construction of segments A-F will not impact any identified threatened or endangered species.

FREA at V-15.

127. Since 1986, the State of Vermont has listed several wildlife species as endangered or threatened. Species listed since 1986 include, among others:

a. the threatened Eastern Sand Darter (*Ammocrypta pellucida*)

b. the endangered Lake Sturgeon (*acipenser fulvescens)*

c. the threatened Giant Floater mussel (*pyganodon grandis*)

d. the endangered Pocketbook mussel (*Lampsilis ovata*)

e. the endangered Fluted Shell mussel (*Lasmigona costata)*

f. the endangered Fragile Papershell mussel (*Leptodea fragilis*)

g. the threatened Eastern Pearlshell mussel (*Margaritifera margaritifera)*

h. the endangered Pink Heelsplitter mussel (*Potamilus alatus*)

128. These species are found in areas of the Lower Winooski River that will be affected by construction of Segment A-F.

129. The Eastern Sand Darter and the Giant Floater have been documented in the Winooski River both above and below the Winooski Falls.

130. The Lake Sturgeon, Pocketbook mussel, Fluted Shell mussel, Fragile Papershell mussel and Eastern Pearshell mussel have been documented in the Winooski River below the Winooski Falls.

131. Known threats identified for the threatened and endangered mussels present in the lower Winooski River include sedimentation and siltation, discharge of metals and other pollutant from stormwater runoff, and nutrient enrichment in flowing waters.

132. The construction and use of Segment A-B will result in the increased sedimentation and siltation in the Winooski River.

133. The construction and use of Segment A-F will result in the discharge of metals, hydrocarbons, excess nutrients and other pollutants from stormwater runoff into the Winooski River.

134. The FREA did not consider the impact of constructing Segments A-B or the CCCH Full-Build on any of the species listed above in ¶127.

135. Even though a "site review" had already been conducted, FHWA was unaware of the presence of the species listed in ¶127 until notified by letter from Plaintiffs' attorney on August 15, 2003.

Purpose & Need

136. The FREA's conclusion that construction of Segment A-B supports the project's purpose and need is unfounded.

137. The FREA defines "the project" as the fully built CCCH.

> The August 15, 2003 Revised EA/Reevaluation utilizes updated traffic data to determine if the purpose and need for the project continues to exist as identified in the 1986 CCCH FEIS. The 1986 CCCH FEIS project purpose and need is based upon existing and future area transportation requirements, and identifies deficiencies in the area transportation network.

FREA at II-1

138. The FREA does not define the purpose as Completion of Segment A-B or Segment A-F.

139. The FREA also states that: "While the EA/Reevaluation principally focuses on changes in direct impacts associated with construction of Segments A-F, the purpose and need is evaluated for Segments A-F and the entire CCCH, Segments A-J." FREA at II-1.

140. Evaluation of purpose and need cannot be accomplished without full assessment of all impacts associated with the project.

Traffic/Segmentation

141. The Defendants' own studies show that construction of Segment A-B will actually increase regional traffic congestion. This is contrary to the stated purpose and need, and contrary to the Defendants' conclusion that Segment A-B has independent utility.

142. The FREA includes a comparative analysis of traffic conditions expected to result from four different scenarios.

143. The first scenario is the No-Build alternative, which assumes no transportation infrastructure improvements.

144. The second scenario is the No-Build alternative *plus* transit improvements, transportation system management (TSM) measures, and transportation demand management (TDM) measures. Transit measures refer to regional transit assumptions including the Burlington-Essex commuter rail service and the Champlain Flyer (Burlington to Charlotte). TSM measures refer to techniques designed to improve the operation of existing roadways such as adjusting signalization and making minor lane modifications. TDM measures refer to methods used to manage the number and time of day that vehicles are on the road.

145. The third scenario is the A-B alternative. Analysis of the A-B alternative also assumes transit/TSM/TDM improvements.

146. The fourth scenario is the Full-Build Alternative. Analysis of the Full-Build alternative (Segments A-J) assumes transit/TSM/TDM improvements as well.

147. One of the Purpose and Needs of the 1986 FEIS is to "reduce existing and future traffic congestion."

148. The Traffic Analysis conducted in the FREA concludes that construction of Segments A-B alone will result in a greater increase in congested Vehicle Miles Travel (VMT) compared to the No-Build alternative in 2023.

149. An increase in congested VMT over the No-Build alternative is contrary to the Purpose and Need of "reducing existing and future congestion."

150. The Traffic Analysis conducted in the FREA concludes that construction of the Full-Build alternative is required to achieve a reduction in congested VMT by 2023. The Full-Build alternative is a four-lane, 16.8-mile-long highway.

151. The VTrans website states that: "when completed, the CCCH will be a 15.8 mile long, limited access, two lane-two way highway with climbing lanes constructed on [a] four lane right-of-way."

152. Another Purpose and Need of the 1986 FEIS is to "assist local roads to function within their design and operational capabilities."

153. The FREA does not support a conclusion that the CCCH satisfies this Purpose and Need.

154. Three of the four intersections cited in the 1986 Purpose and Need statement to justify building the CCCH will continue to operate at a failing Level of Service (LOS) even if the CCCH is constructed (Five Corners, Sand Hill/Route 117, Allen Martin/Sand Hill) (LOS is a standard methodology for determining the relative level of traffic flow congestion and delay at intersections).

155. The fourth intersection cited in the 1986 Purpose and Need, Route 2A at South Street/IBM, will function with acceptable traffic flow with or without the CCCH.

156. The major intersection at Five Corners will remain at LOS F whether or not the CCCH is constructed.

157. The EA does not discuss recent information, prepared for FHWA in another FEIS reviewing the Route 15 corridor, that indicates that a roundabout at Five Corners would outperform the CCCH.

158. The information in the EA/RE does indicate that some intersections may experience some modest congestion relief with Segment A-B. However, a close scrutiny reviews that the modest relief comes at the expense of increased congestion along local streets accessing the intersections. The FREA discusses no mitigation for this shifting of congestion problems by the CCCH.

159. The FREA also shows that segments of the CCCH itself will operate at unacceptable levels of service.

160. The FREA Traffic Analysis also contains significant omissions. For example, no traffic volume data is considered for any of the Interstate segments, or for several roadways at the northwest end of the CCCH. In addition, although the REA indicated that several un-signalized intersections would experience a decrease in LOS with construction of A-B or the Full-Build, these un-signalized intersections were removed from consideration in the FREA.

161. The Traffic Analysis conducted in the FREA also indicates that the No-Build alternative + Transit/TSM/TDM measures would reduce the time delay at more intersections during both the AM and PM peak hours than the A-B alternative, even though the TSM measures selected are quite modest and do not consider many available TSM options.

162. The Traffic analysis of the No-Build alternative + Transit/TSM/TDM measures only considers the TSM measures identified in the Chittenden Country Metropolitan Planning Organization (CCMPO) 2003 Draft Long-Range Transportation Plan (LRTP).

163. TSM alternatives identified in the CCMPO 2003 Draft LRTP already assume construction of the CCCH Full-Build Alternative. These alternatives are limited to minor changes to intersections, such as signal coordination,

and minor lane group modifications and do not consider many TSM alternatives that could be implemented in place of the CCCH Full-Build.

164. EPA requested that FHWA include roundabouts as a TSM measure.

165. The TSM measures considered do not include roundabouts.

166. TSM measures are defined by the CCCMPO to be low-cost measures designed to reduce congestion. The TSM alternatives actually considered by the FREA do not actually decrease congestion but rather increase congested VMT.

167. The Traffic Analysis conducted in the FREA relied on the same trip-generation parameters for evaluating the traffic impacts of the No-Build alternative, the No-Build alternative + Transit/TSM/TDM measures, the A-B alternative, and the Full-Build Alternative.

168. The Traffic Analysis conducted in the FREA did not take into consideration new trips induced by construction of Segments A-B.

169. The Traffic Analysis conducted in the FREA did not take into consideration new trips induced by construction of the Full-Build CCCH.

170. The Traffic Analysis conducted in the FREA relied on the same population and employment growth estimate for evaluating the traffic impacts of the No-Build alternative, the No-Build alternative + Transit/TSM/TDM measures, the A-B alternative, and the Full-Build alternative.

171. The population and employment growth estimate used to evaluate traffic under the build alternatives (the A-B and Full-Build alternatives) as well as the No-Build alternatives already assumes construction of the CCCH.

172. The Traffic Analysis conducted in the FREA did not take into consideration the potential for new traffic resulting from growth induced by construction of Segment A-B.

173. The Traffic Analysis in the FREA did not take into consideration the potential for new traffic resulting from growth induced by construction of the CCCH Full-Build.

174. The Traffic Analysis in the FREA did not take into consideration construction of the CCCH as only a two-lane highway with climbing lanes.

175. The Traffic Analysis also assumes the continued operation of the Champlain Flyer commuter train and the establishment of the Burlington-Essex commuter rail service.

176. The Champlain Flyer is no longer in operation.

177. The Burlington-Essex commuter rail service may never be funded.

Sprawl

178. The FREA also fails to adequately consider the impacts of sprawl associated with construction of Segment A-B. Sprawl consists of both "induced growth" – growth that would not have occurred in the region without construction of the Highway – as well as "redirected growth" – growth that would have occurred in high-density urban areas but is directed

away from urban areas toward low-density development in more rural areas because of the increased accessibility provided by the new highway.

179. The FREA includes a limited analysis of future growth induced by construction of the CCCH Full-Build.

180. The FREA induced growth analysis is based on comparing growth expected under the No-Build scenario with growth expected from the CCCH Full-Build scenario.

181. The FREA concludes that construction of the CCCH would not materially affect the extent of growth in Chittenden County, but would partially refocus and redirect growth to areas that have increases in accessibility due to the construction of the CCCH.

182. The FREA's induced growth analysis concludes that the Full-Build CCCH will induce less than 1% of growth in Chittenden County above the growth expected from the No-Build alternative.

183. The assumptions underlying the FREA conclusions on induced growth are not reasonable and are unfounded.

184. The FREA analysis of induced growth used the same employment and population projections for its evaluation of the No-Build and Full-Build scenarios.

185. The FREA's induced growth analysis relies on the Chittenden County Metropolitan Planning Organization's Integrated Transportation and Land

Use Model (CCMPO model) to evaluate the No-Build and Full-Build scenarios.

186. The CCMPO model relies on demographic and employment projections for Chittenden County identified in the *Economic and Demographic Forecast*, prepared by Economic & Policy Resources, Inc.

187. The *Economic and Demographic Forecast* study assumes in its estimates of population and employment growth that all planned infrastructure improvements, including the CCCH Full-Build, will be completed to support projected growth.

188. The population and employment data used to analyze the No-Build alternative assumes the construction of the CCCH.

189. The FREA induced growth analysis contains the default assumption of zero percent difference in the magnitude of growth in Chittenden County with and without the CCCH.

190. By using the same employment and population data for the No-Build alternative and the Full-Build alternative, the FREA induced growth analysis fails to provide any meaningful evaluation of the growth potentially induced by the CCCH and substantially underestimates the potential induced growth caused by the CCCH Full-Build.

191. The FREA also underestimates the potential for induced growth caused by the CCCH by using artificially low estimates of square-footage associated with new households and new employees.

192. On June 13, 2003 EPA informed FHWA that it should assume that each household would result in development of 40,000 square feet of land. The FREA assumes that only 5,000-10,000 square feet of land will be developed for each new household.

193. Likewise, FWHA assumes only 500 square feet of development per employee. It should assume at least 2500-5000 square feet per employee.

194. The FREA underestimates the potential for induced growth caused by the CCCH by assuming that current local zoning regulations will prohibit development on otherwise developable land.

195. The Defendants' induced growth analysis is based on the assumption that local zoning regulations will remain constant.

196. The induced growth analysis fails to consider or evaluate the pressure to change local zoning to accommodate increased accessibility to undeveloped land.

197. The National Highway Cooperative Research Program's guidebook on land use impacts of transportation notes that: "[i]f one policy assumption is that current zoning will remain in effect, then the impact assessment should evaluate whether there would be pressure to change that zoning because of the changes in accessibility."

198. The FREA did not consider these pressures but instead assumed that local zoning would remain unchanged in the areas subject to CCCH induced growth.

199. The Oregon Department of Transportation found in a 1994 study that the effect of government policies, such as zoning, taxes, and public services, on land conversion is limited and that local zoning has generally proven ineffective at controlling growth when roads create new access to rural lands. *See The Effects of Transportation Improvements on Rural Lands: A Framework for ODOT Policy,* Oregon DOT, August, 1994.

200. Defendants' induced growth assumptions also underestimate the amount of land available for development in Chittenden County and therefore underestimate the potential for induce growth caused by the CCCH.

201. For example, Defendants' find that "induced growth tends to be initially located as either infill or adjacent development to existing developed areas." FREA page VI-166.

202. But Defendants acknowledge that they have underestimated the amount of land available for infill and redevelopment, perhaps by as much as 3000 acres. *See* Response to Comments FOE(2)2-5.

203. The FREA also assumes that only 50% of the land classified as "partially constrained" is available for development.

204. Defendants do not provide justification for selecting 50% over any other random percentage.

205. The FREA inaccurately concludes that "the largest portion of CCCH induced growth, and the potential for CCCH induced growth to area

resources, is within identified metropolitan and village planning areas, which are close to the CCCH." FREA page VI-432.

206. Table G4-c1 in the REA provided a different conclusion, indicating that 83% of the land "moderately" or "substantially accessible" due to construction of the CCCH was in transition, rural or special planning areas, while only 17% of this accessible land was in metropolitan or village planning areas.

207. Table G4-c1 was removed from the FREA.

208. The largest amount of land, by acreage, potentially subject to induced growth due to construction of the CCCH is actually in transition, rural or special planning areas, not in metropolitan and village planning areas.

209. The FREA does not disclose this fact.

210. The commute-shed for Chittenden County extends beyond Chittenden County.

211. However, the FREA induced growth analysis does not adequately consider the potential for induced growth resulting from new trips into Chittenden County, or the potential for induced growth outside of Chittenden County.

212. FHWA relies on use of the Statewide Traffic Model to evaluate the potential for induced growth within Chittenden County and surrounding counties.

213. EPA found that using the Statewide Traffic Model does not address the question of the CCCH effect on the magnitude of Chittenden County Growth.

214. Construction of the CCCH will induce 49,062 additional inter-county miles each year by 2023.

215. EPA concluded "that a gain of 49,062 miles traveled in 2023 at Full-Build as compared with No-Build isn't insignificant."

216. In order to try to address EPA's concerns over the secondary environmental impacts of induced growth associated with the CCCH, FHWA agreed as a mitigation commitment to "provide financial assistance to planning agencies to help communities with growth management..." ROD page 12.

217. The FHWA supported its 2003 ROD based on the commitment made to EPA.

218. In a September 12, 2003 letter from EPA to FHWA, EPA raised concerns over FHWA treatment of its induced growth mitigation commitments in the ROD.

219. In the September, 2003 letter EPA stated that the ROD did not accurately describe the commitment FHWA made to EPA to "provide resources to help communities address the changes in population and employment that the highway will induce."

220. EPA concluded that the statement in the ROD that Defendants would "continue to provided training and resources to planning agencies in Chittenden and adjacent counties to assist these agencies in addressing

future growth issues" was "weaker" than the commitment FHWA had agreed upon.

221. EPA noted that it was its understanding "that FHWA and VTrans committed to increase [funding assistance] to a level above and beyond that which is already provided..."

222. In making these commitments, Defendants acknowledge that the FREA provided an inadequate analysis of measures to mitigate induced growth impacts associated with the "changes in population and employment that the highway will induce."

223. In addition, these mitigation measures were not disclosed to the public during the FREA process, and as a result the public has not had the opportunity to comment on the nature of the mitigation commitments.

224. FHWA has also misled the public with respect to other mitigation commitments.

225. For example, the FREA states that mitigation commitments relevant to protection of agricultural land, including the establishment of a farmland conservation program, have been accomplished.

226. However, there is no regional farmland conservation program consistent with the program described in the Vermont Land Trust study, nor is there a regional fund to support this program.

Cumulative Impact

227. NEPA requires FHWA to consider the cumulative impact of the proposed action and other past, present or reasonable foreseeable future actions.

228. The 1986 FEIS did not consider the cumulative environmental impact of other past, present or reasonably foreseeable actions on environmental resources including, among others, air quality, water quality, environmental justice, and noise.

229. The Traffic Analysis conducted in the FREA was based on assumed infrastructure improvements identified in the current CCMPO Transportation Improvement Plan (TIP) including: Shelburne Road Widening; Kennedy Drive Widening; The Southern Connector; Market Street Extension in South Burlington; US Route 7 Extension in South Burlington; US Route 7/Route 15 One-Way Street System in Winooski; Remaining Route 127 Corridor Improvements; Intersection Improvements to Route 117 and Sand Hill Road; Intersection Improvements to Route 15 and Old Stage Road; Intersection Improvements to Route 15 and Sand Hill Road; Intersection Improvements to Route 2A and Industrial/Mountain View Road.

230. The CCMPO's 2003 draft Long-Range Transportation Plan (LRTP) also identifies other foreseeable transportation improvements including, among many others, widening I-89 to six lanes from Exit 13 to Exit 16 and reconstructing several I-89 exits.

231. The FREA did not consider the cumulative impact of construction of Segment A-B together with other past, present, or reasonably foreseeable future actions, such as the commitments identified in the CCMPO TIP and the improvements identified in the LRTP

232. Together, these actions will likely have significant impacts on the environmental resources in Chittenden County, and these significant impacts were ignored by both the FEIS and the FREA.

Air Pollution

233. Defendants have not adequately studied, considered and disclosed the air pollution impacts associated with construction of Segment A-B, and have entirely failed to consider some air pollution impacts that would result from the construction of these sections of the CCCH.

234. The FREA concludes that construction of Segments A-F would result in vehicle air emissions that are within National Ambient Air Quality Standards (NAAQS) criteria and in conformance with the Vermont State Implementation Plan (SIP) for air quality.

235. The FREA relies on construction of the Full-Build CCCH to justify its conclusion that there are no new significant air quality impacts.

236. The FREA concludes "despite a potential slight increase in VMT, associated with the construction of the CCCH, overall area traffic air emissions (mesoscale) would be reduced as a result of a reduction in

congestion." FREA at p. V-30. This conclusion assumes the Full-Build of the CCCH in 2023.

237. The FREA Traffic Analysis concludes that construction of Segment A-B will result in *both* a total increase of VMT *as well as* an increase in congested VMT compared to the No-Build scenario.

238. Neither the FEIS nor the FREA considered the air pollution impact of this increase in congested VMT that would result from construction of Segment A-B alone.

239. The FREA does not include a mesoscale analysis of the air impact of constructing only Segment A-B.

240. The FREA does not include a new mesoscale analysis of the air impacts of the Full-Build, but instead relies on the inadequate 1986 mesoscale analysis.

241. Neither the FEIS nor the FREA consider the air pollution impacts of a completed CCCH that is two lanes with climbing lanes instead of four lanes.

242. The FREA also fails to acknowledge significant changes in Vermont's air quality conditions and settings that have occurred since 1986.

243. The FREA does not disclose the fact that Chittenden County has violated the federal standards for ozone on several occasions since 1986.

244. The FREA does not disclose that ambient air quality has deteriorated in Chittenden County or that readings for many of the major air pollutants associated with vehicle travel including carbon monoxide (CO), nitrogen

oxides (NOx), particulate matter (PM 2.5 & PM 10), and volatile organic compounds (VOC) have increased in Chittenden County since 1986.

245. The FREA does not disclose that Chittenden County has come close to violating federal standards for PM 2.5 on several occasions since 1986.

246. Despite this change in the context of Vermont's air quality, the FREA does not disclose that air emissions associated with the CCCH could contribute to Vermont falling into noncompliance with the Clean Air Act.

247. Neither the 1986 FEIS nor the FREA consider hazardous air pollutants (HAPs) associated with the Highway's motor vehicle operation emissions.

248. Motor vehicles emit HAPs.

249. HAPs are pollutants known or suspected to cause cancer, other serious human health effects, and ecosystem damage.

250. Since the 1986 FEIS, the State of Vermont has adopted standards and regulations for control of hazardous air pollutants.

251. Existing concentrations of several toxic chemicals, including formaldehyde, benzene, 1.3-butadiene, carbon tetrachloride, methylene chloride, chloroform, tetrachloroethylene, methyl chloride and 1,2,4-trimethyl benzene, currently exceed Vermont State Hazardous Ambient Air Standards (HAAS).

252. Emissions from vehicle operations on the CCCH will cause and contribute to current exceedences of several state HAAS levels including benzene and 1.3-butadiene.

253. There is no air quality evaluation of the Highway's impact on hazardous air contaminants, or of the Project's compliance with state HAAS in the 1986 FEIS or 2002 EA.

254. The Highway is a new, indirect source of air contaminants from mobile emissions for such toxic pollutants as benzene, 1.3-butadiene, and formaldehyde.

255. The State of Vermont has indicated that benzene, a known human carcinogen, is of particular concern to public health.

256. A recent State of Vermont assessment documents that a major source of benzene is automobiles.

257. Monitoring of air toxics was started in 1993 in Vermont, with two monitoring sites established in Chittenden County.

258. The recent HAPs monitoring data shows that median concentrations of benzene exceed the HAAS consistently, at all monitoring sites, including those in the region served by the Circumferential Highway.

259. The FREA does not assess the impact of the Highway on benzene levels, the health effect of increased emissions, and whether the Highway is consistent with state HAAS for benzene and other toxic contaminants emitted by vehicles that would operate on the CCCH.

260. The 1986 FEIS and the FREA also do not address the effects of the CCCH on climate change and greenhouse gas emissions.

261. Since the 1986 FEIS was published it has been established that the accumulation of greenhouse gases in the atmosphere leads to global climate change.

262. Increases in atmospheric temperature and ocean temperatures may raise sea levels and alter weather patterns, which increase the frequency and severity of extreme weather events worldwide.

263. Global warming today is causing widespread problems and is likely to cause severe ecological and socio-economic disruptions in the United States.

264. It is expected that climate change will have a host of negative environmental and economic effects in New England and Vermont.

265. Transportation and VMT is a significant source of greenhouse gas emissions.

266. EPA projects that the transportation sector will be the fastest growing contributor to carbon emissions in the next 20 years.

267. Transportation is responsible for approximately 43% of the greenhouse gases released in Vermont.

268. In addition to carbon emissions, vehicle travel contributes to emissions of two other greenhouse gases – methane and nitrous oxide.

269. Carbon dioxide, nitrous oxide, and methane contribute to global warming.

270. Vermont is projected to experience a 67% increase in these greenhouse gases between 1990 and 2015 (in CO equivalent terms).

271. The CCCH will not reduce VMT as recommended by the 1997 Vermont State Energy and Climate Change Plan.

272. Both Segments A-B and the Full Build project will increases VMT for the Chittenden County region during the next twenty years.

273. The FREA has failed to estimate the total carbon dioxide emissions that will be released from the vehicle travel on the Highway and from induced travel.

274. The CCCH project will add millions of tons of CO to the atmosphere from its operation during the next twenty years.

275. These emissions will contribute to climate change and the impacts of climate change in Vermont, the region, and the United States.

276. The FREA does not assess the direct, indirect, and cumulative impacts of the Highway on contributions to climate change, and does not address mitigation for these effects.

277. The FREA also did not consider or disclose the impact of increased ambient air pollution on Allen Brook School.

278. Allen Brook School is located approximately 300 feet from the four-lane section of Segment A-B.

279. The air pollution emissions resulting from vehicle travel on the proposed four-lane highway located 300 feet from Allen Brook School will lead to an increase in ambient air pollution around the school.

280. Diesel trucks traveling to the IBM campus, the Williston Transfer Station, as well as other areas in Williston and Essex, will use the portion of Segment A-B that passes Allen Brook School.

281. Air emissions from diesel trucks contain a number of air pollutants including, among others, nitrogen oxides, sulphur oxides, ozone, particulate matter, polycyclic aromatic hydrocarbons (PAHs), and benzene.

282. Levels of these air pollutants are likely to increase around Allen Brook School due to increased truck travel on the four-lane section of Segment A-B.

283. Neither the 1986 FEIS nor the FREA considered the cumulative impact on air quality resulting from the increase in congested VMT from Segment A-B and other past, present or reasonably foreseeable future actions in Chittenden County and the surrounding region.

Water Resources

284. The FREA's analysis of the Highway's surface waters impacts fails to consider several significant impacts and is otherwise so flawed that it substantially underestimates the impact that construction and use of the CCCH will have on water resources.

285. The FREA fails to consider the significant change in context surrounding the discharge of pollutants from the Highway since water

resource impacts were initially identified in the 1986 FEIS, including the fact that several affected receiving waters are now classified by the State of Vermont and EPA as exhibiting water quality impaired conditions under the federal Clean Water Act and are violating state water quality standards.

286. Since the 1986 FEIS was published, it has been established that Vermont law prohibits new and increased discharges of pollutants of concern into impaired waters in the absence of a Total Maximum Daily Load.

287. The proposed Highway will discharge increased loads of stormwater and associated pollutants (sediment, metals, nutrients) into Allen Brook, Indian Brook, Muddy Brook and Sunderland Brook, all waters determined since publication of the 1986 FEIS to be impaired primarily by sediment and now included on the EPA-approved State of Vermont 2002 List of Impaired Waters.

288. The proposed Highway also will discharge increased loads of phosphorus and stormwater pollutants into Lake Champlain. Since publication of the 1986 FEIS, Lake Champlain has been determined to be impaired because of phosphorus and is included on the EPA-approved State of Vermont 2002 List of Impaired Waters.

289. These waters were classified as impaired and in violation of Vermont state water quality standards *after* publication of the 1986 FEIS. That is, 1986 FEIS, there has been a change in the environment affected by the CCCH – these watersheds directly affected by the Highway are now legally

classified as impaired under Vermont law and the federal Clean Water Act, and the Highway's stormwater discharges will cause and contribute to existing and further violations of Vermont water quality standards. These violations did not exist at the time of the FEIS publication.

290. The FREA never discusses that state and federal laws prevent the increased discharge of stormwater contaminants and phosphorus from the Highway into these waterways because of the impaired status of the receiving surface waters. The FREA never discloses that the CCCH stormwater discharges will cause and contribute to new violations of state water quality standards.

291. The primary pollutant causing the failure of the receiving streams and rivers to comply with Vermont Water Quality Standards is sediment.

292. The primary pollutant causing failure of Lake Champlain to comply with the Vermont Water Quality Standards is phosphorus.

293. The construction and use of the CCCH will result in the release of new loads of phosphorus pollution to Lake Champlain.

294. The Vermont Agency of Natural Resources (VANR) has collected data over the last few years that indicate that biological communities in these affected waters are not of sufficient quality to satisfy the narrative biota standards or the biological criteria of the Vermont Water Quality Standards.

295. The FREA never analyzes the effect of the new pollutant loading from the CCCH on the already degraded biological condition of these streams and Lake Champlain.

296. There are no approved TMDLs or clean-up plans for Allen Brook, Indian Brook, Muddy Brook, or Sunderland Brook. There also are no established wasteload allocations for the new CCCH stormwater discharges that will reasonably ensure attainment of water quality standards in these streams with the increased pollution from the CCCH.

297. The FREA states that the water quality impairments to Allen Brook and Indian Brook will be addressed by Watershed Improvement Permits and a TMDL clean-up plan for Allen Brook. FREA Page V-26. However, these Watershed Improvement Permits have been determined to be inadequate and unlawful by Vermont regulatory authorities and VANR has no plans to adopt a TMDL for Allen Brook in the near-term.

298. The CCCH will increase pollutant loads of total suspended solids (TSS or sediment), total phosphorus, nitrogen, metals, bacteria, and hydrocarbons to the streams identified above and to Lake Champlain. However, the FREA only estimates the loading of sediment from post-construction operation of the Highway to Allen Brook. The FREA does not analyze or estimate the amount of increased loading of all these pollutants from the Highway's stormwater discharges both during construction and post-construction into

all receiving waters. The FREA fails to quantify and evaluate the full impact of all stormwater pollutant loading caused by the CCCH.

299. The FREA fails to discuss or analyze how this new pollution into already impaired waters will hinder and delay Vermont's ability to comply with the Clean Water Act and state water laws.

300. The FREA suggests that there is a TMDL for Allen Brook in development that will reduce sediment loading to Allen Brook. However, the Allen Brook TMDL is not complete, published, approved by EPA, or included in the FREA for public comment and analysis. Moreover, after publication of the 2003 ROD and FREA, the State of Vermont has stated that it has rejected a draft Allen Brook TMDL and has no immediate plans to develop a TMDL for Allen Brook.

301. Until a TMDL is complete, approved by EPA, and implemented, it has no significance in addressing or mitigating new pollution from the CCCH into Allen Brook. There also is no information to suggest that the Allen Brook TMDL, when and if approved, will establish an appropriate pollution wasteload allocation for the CCCH and its induced growth.

302. The FREA fails to use current and adequate methods for analyzing highway runoff to assess highway runoff impacts from the CCCH.

303. Neither the FEIS nor the FREA contains or performed a loading analysis for phosphorus or other contaminants such as bacteria, toxins/metals, or nitrogen, despite the fact that the runoff from the CCCH

will increase contaminant and nutrient loads to receiving waters, including Lake Champlain.

304. Total phosphorus loads to all receiving waters from the CCCH, including Lake Champlain, will increase under the CCCH build scenario. The 1986 FEIS and FREA do not quantify these phosphorus loads or evaluate the effectiveness of proposed stormwater treatment measures to reduce phosphorus loading.

305. The FREA refers to the new 2002 Lake Champlain Phosphorus TMDL, but does not analyze whether the TMDL actually accounts for or provides an allocation for the CCCH discharges of phosphorus. The FREA provides no analysis of whether the CCCH phosphorus loads to the Lake are consistent with the Champlain TMDL's wasteload allocations.

306. The FEIS and the FREA also failed to adequately consider the impact of increased sodium and chloride from the Highway's operation on receiving waters.

307. The CCCH will increase sodium and chloride impacts to receiving waters as a result of winter maintenance salting.

308. Neither the FEIS nor the FREA contains an analysis of the impact to surface waters of additional sodium and chloride that will be released to area waters due to increased deicing applications for winter maintenance.

309. The FEIS concluded that "increased levels of some pollutants from construction and roadway runoff, including road salt and turbidity" was a probable adverse impact of the CCCH.

310. The FREA relies on this general FEIS disclosure to justify its decision not to conduct further evaluation of deicing impacts.

311. Since 1986, there is substantial new information and detailed studies showing that road salt application to highways in New England has and is creating significant water pollution impacts. *See* Granato, Gregory E. and Smith, Kirk P., 1999, "Estimating Concentrations of Road-Salt Constituents in Highway Runoff from Measurements of Specific Conductance": USGS WRIR 99-4077.

312. The Draft EIS for the proposed I-93 expansion project in New Hampshire, prepared by FHWA, found that conventional stormwater detention ponds and grass swales have little to no effect on reducing dissolved sodium and chloride ions from runoff.

313. FHWA took a hard look at the issue of road-salt pollution and mitigation in the contemporaneous NEPA review of I-93's expansion, but did not do so for the CCCH.

314. The CCCH will rely on conventional stormwater detention ponds and grass swales to reduce the impact of pollutants, including dissolved sodium and chloride ions, contained in stormwater runoff.

315. In the FREA, Defendants rely on the April 2002 Vermont Stormwater Manual to address and control stormwater pollutant loading from the Highway's stormwater discharges. However, the FREA fails to discuss or acknowledge that use of this Manual's procedures are widely recognized by the State of Vermont and EPA as not being effective at achieving full mitigation of increased pollutant loading from the Highway's stormwater discharges.

316. The FREA also does not examine the impact of road salt on community water supplies and wellhead protection areas for the CCCH.

317. However, the FHWA did examine this issue in the contemporaneous NEPA review for the New Hampshire I-93 project.

318. The FHWA supported its 2003 ROD based on a commitment made to EPA that FHWA and VTrans will conduct a statewide study of roadway deicing to evaluate the potential for road salt runoff to impact waterways from the Highway. According to EPA, FHWA and VTrans also committed to address any problems identified by this road salt study. In a September 12, 2003 letter from EPA to FHWA, EPA stated that the ROD and FEIS did not contain a detailed description of this mitigation commitment, but that FHWA should develop a plan for implementing these commitments and make the information publicly available.

319. In making these commitments, Defendants acknowledge that the FREA provided an inadequate analysis of the Highway's water quality impacts and of measures to mitigate these impacts.

320. The ROD does not contain legally binding commitments to implement the recommendations of the road salt study.

321. The ROD fails to commit any entity to implement specific measures to reduce, mitigate, or offset the increased water pollutant winter salt discharges caused by the Highway.

322. The FEIS and the FREA also fail to adequately consider the impact of stormwater and construction sediment loading associated with the construction phase of Segment A-B.

323. VTrans is proposing an offset for the sediment loading into Allen Brook from the Highway's post-construction or operational use stormwater discharges, by reducing winter sanding on Route 2A.

324. This offset is only for sediment, and does not mitigate the impacts of increased loading to area streams from phosphorus, metals, toxins, nutrients, bacteria, and salt.

325. In addition, the sediment offset only offsets the sediment from the operational phase discharges of the CCCH into Allen Brook, not from its construction activities over three years.

326. New sediment loads will be caused by the actual construction of the Highway. EPA emphasizes the inadequacy of this sediment offset in a recent letter to FHWA on April 4, 2003 stating:

> ... the proposed compensation plans (low sand application and catch basin cleaning along US Route 2) represent a limited approach to offsetting sediment loads. This action should be just one part of a larger effort to operate a comprehensive management and maintenance program that FHWA should develop in concert with VTrans and VANR, especially where impaired waters are affected...
>
> While the documentation and nonpoint source pollution control plan acknowledge sediment and other loading impacts from the construction phase of the project, it does not characterize the magnitude of these impacts or propose any compensation for the construction phase. ... Given that Allen Brook is an impaired water, a compensation plan for loadings resulting from the construction phase should be developed.

*See* Correspondence from Robert W. Varney, EPA Regional Administrator to Charles Basner, Division Administrator, FHWA, April 4, 2003.

327. FHWA has not responded to EPA's original objections to the offset plan and the FREA still does not examine the stormwater pollution loadings from the construction phase of the Highway.

328. The most significant pollutant loading to Allen Brook will occur during the three years of highway construction. However, the FREA does not quantify the construction phase pollutant loading to Allen Brook or to any other receiving water, such as the Winooski River and Lake Champlain.

329. The FREA also does not discuss that Defendant VTrans proposes to violate state water quality standards for turbidity and aquatic biota criteria during the construction of the Highway over a three to four year period and is requesting an unlawful waiver of the Clean Water Act to perform the construction.

330. The FEIS and FREA both fail to discuss the fact that the construction discharges from the CCCH will create new violations of water quality standards in Allen Brook and the Winooski River.

331. After the publication of the FREA and ROD, Defendant VTrans prepared new analyses to quantify the amount of pollutant loading for phosphorus, metals, sediment, and other contaminants that will result from the Highway's use.

332. This new information, while still underestimating the amount of pollutant loading from the Highway, shows that the Highway's operation will increase loading of these pollutants to Allen Brook and Lake Champlain and contribute to existing violations of state water quality standards in violation of state law and the Clean Water Act.

333. This new information confirms that the CCCH impacts to water quality will be greater than originally identified in the 1986 FEIS and will be greater than acknowledged in the FREA, and that the Highway's stormwater discharges will violate state water quality standards. This new

information has never been provided to the public for comment during the NEPA process.

334. After publication of the 2003 ROD and FREA, Defendant VTrans also proposed a new water pollution offset to try to mitigate for the stormwater discharges from the Highway's post-construction use. The supplemental offset involves conversion of farmland to untilled meadow in the Allen Brook watershed in Williston to mitigate for the Highway's increased phosphorus and sediment loading to Allen Brook. This mitigation proposal was never mentioned in the FREA or ROD.

Noise

335. In the FREA the Defendants conclude that there are no new noise impacts beyond those identified in the 1986 FEIS. This conclusion is based on an inadequate consideration of new noise receptors that have been developed along the CCCH corridor since 1986.

336. New noise receptors that have been developed along the CCCH corridor since VTrans completed the 1986 FEIS, including, among others: the Southridge housing development; the Allen Brook School; a golf course; the Brennan Woods housing development; the Martel Hill housing development; and a recreational complex.

337. The FREA fails to take a hard look at the impact that construction and operation of Segments A-B would have on these new noise receptors.

338. Under FHWA noise regulations, traffic noise impacts may occur either (1) when the predicted traffic noise levels approach or exceed the noise abatement criteria (NAC) level, or (2) when the predicted traffic noise levels substantially exceed the existing noise levels, even if the predicted noise level will not reach NAC levels.

339. The average exterior NAC level for schools and playgrounds is 67 dBA. The average interior NAC level for schools is 52 dBA.

340. FHWA has conducted some noise monitoring adjacent to Segments A-B. This monitoring concluded that traffic impact noise levels will reach 70dBA at a distance of 250ft from the CCCH.

341. The travel lanes of the Segment A-B corridor will come within 300 feet of Allen Brook School.

342. The FREA at Page V-33 states that Allen Brook School is located approximately ½ mile west of Station 770. A ½ mile is approximately 2600 feet.

343. Allen Brook School is actually located approximately 300 feet west of the CCCH alignment, and is approximately nine times closer to the CCCH alignment than the distance disclosed to the public in the FREA.

344. Allen Brook School has recently constructed new classrooms that are closer to the CCCH alignment than the original school building.

345. Although Defendants identified Allen Brook School as a new noise receptor, Defendants have not physically conducted any noise monitoring on

the grounds of Allen Brook School. Defendants do not know, and have not evaluated the existing noise levels at Allen Brook School.

346. The FREA does not disclose the predicted noise levels at Allen Brook School or the predicted increase in noise levels over the existing noise levels at Allen Brook School.

347. Defendants' obligation to consider and disclose the nature of noise impacts on new noise receptors under NEPA and CEQ regulations is distinct from their obligation to mitigate any potential noise impacts under 23 C.F.R part 772.

348. Both the increase over existing noise levels and the absolute noise level associated with construction and operation of a four-lane highway 300 feet from Allen Brook School will have a significant impact on the educational environment at Allen Brook School.

Environmental Justice

349. Environmental Justice impacts associated with construction of the CCCH were not considered in the 1986 FEIS and the FREA has failed to adequately consider the impact on minority/low-income communities in the project area.

350. The Old North End section of Burlington is identified as an area that has a concentration of minority/low-income families.

351. The information in the FREA indicates that jobs will be shifted to locations further away from the Old North End section of Burlington.

352. The Defendants' own studies establish that over 850 jobs will be lost in areas identified as the Inner Cities of Burlington, South Burlington, Essex Junction and Winooski.

353. FREA indicates that these jobs will primarily be directed out of areas identified as the Inner Cities and into areas identified as the Core Towns of Essex, Williston and Colchester.

354. Those areas of Chittenden County anticipated to experience job growth have substantially less public transportation access than those areas anticipated to experience job loss. Some areas anticipated to experience job growth have no public transportation access.

355. The towns of Colchester and Williston are not members of the Chittenden County Transit Authority (CCTA).

356. Only one of CCTA's eleven bus routes provides access from Burlington to Essex

357. Only one of CCTA's eleven bus routes provides access from Burlington to Williston.

358. None of CCTA's bus routes provide access from Burlington to Colchester.

359. Those individuals who rely on public transportation to reach their jobs will suffer a disproportionately greater impact than those who can afford to drive themselves, due to decreased public transportation access to these relocated jobs.

360. The FREA does not evaluate the impact of this shift in jobs on low-income/minority populations.

361. The FREA does not disclose the fact that these jobs will be substantially harder to reach via public transportation.

362. Because of these adverse impacts, the minority/low-income communities located in the North End will not receive a proportionate share of the benefits of the project.

363. These impacts were not considered in the 1986 FEIS. In fact these impacts are directly contrary to the findings of the 1986 FEIS.

364. The 1986 FEIS stated that the CCCH is "not anticipated to be a deterrent to the economic viability of the county's existing urban center, Burlington . . . . Population, employment and housing in Burlington are expected to increase in the future."

365. The 2003 FREA, however, shows that Burlington's population, employment and housing are expected to decrease as a result of induced growth from the CCCH.

366. This significant difference in projected impacts is not discussed in the FREA despite the fact that Burlington's low-income/minority communities may bear a disproportionate share of the impact.

367. In addition, the FREA does not evaluate the impact of the selected alternative on low income and minority communities in relationship to other reasonable alternatives to the Highway build scenario.

368. A properly prepared EA, like an EIS, must consider reasonable alternatives to the proposed action.

369. Because Environmental Justice issues were not a concern in 1986, the relative impact of reasonable alternatives on these communities was not considered in the 1986 FEIS.

370. NEPA requires the that Defendants, at a minimum, compare the impact of other reasonable alternatives on the region's low-income and minority communities to the impacts associated with the proposed action's impacts.

Controversy

371. FHWA is obligated under NEPA to consider the degree to which a project's effects on the quality of the human environment are likely to be highly controversial.

372. Numerous commentators have raised serious concerns of the effects of the CCCH on the human environment.

373. FHWA has attempted to dismiss the controversy over the project by characterizing the opposition as "a limited number of private interest groups and individual commentators."

374. This characterization does not accurately portray the scope of public controversy over the CCCH project.

375. Twelve individuals submitted comments on the REA. Eleven of the comments opposed the project and expressed serious concern about the analysis.

376. Sixty-one individuals commented on the FREA. Fifty-seven of these commentators (93%) expressed concern over the analysis presented in the FREA and potential adverse impact of building the CCCH.

377. Eight private organizations submitted comments to the agencies. Five of eight private organizations expressed concern over the project and analysis.

378. EPA also submitted comments expressing concern over the REA and the FREA analysis. EPA requested that FHWA prepare an SEIS to examine the Highway's impacts. FHWA has not addressed all of EPA's concerns, and as recently as September 12, 2003 EPA raised additional concerns related to FHWA's mitigation commitments.

379. The Burlington City Council has passed numerous resolutions raising concerns over the impacts of the CCCH.

380. These comments raise substantial questions as to whether the CCCH project may cause significant degradation of some human environmental factors.

381. These comments highlight a substantial controversy over the nature and effect of the impacts resulting from the CCCH.

Cost/Benefit Analysis

382. The FHWA has not ever presented a monetary cost benefit analysis of alternatives considered in the 1986 FEIS.

383. The FREA does not present a cost-benefit analysis for construction of Segment A-B or the entire CCCH.

384. The estimated cost of constructing the entire four-lane CCCH is approximately $180 million.

385. At best, the FREA Traffic Analysis indicates that the A-B alternative will only result in a 10-second delay reduction on the average automobile trip in the region compared to the No-Build alternative + Transit/TSM/TDM measures.

386. The FREA Traffic Analysis indicates that the Full-Build alternative will result in a 34 second delay reduction on the average automobile trip in the region compared to the No-Build alternative + Transit/TSM/TDM measures.

387. Charles E. Basner, Vermont FHWA Division Administrator, noted on the form nominating the CCCH for accelerated review under E.O.13274 that "[t]he purpose of the CCCH is to provide for economic development and respond to existing deficiencies in [road system hierarchy, highway capacity, and safety]."

388. The Defendants' own induced growth analysis establishes that the CCCH will not provide for any economic development in Chittenden County.

389. The Defendants' own induced growth analysis establishes that Chittenden County will lose four jobs if the CCCH is built.

390. The Defendants' own traffic studies establish that Segment A-B will result in an increase in regional traffic congestion, even without accounting for induced traffic and traffic generated by sprawl.

Failure to Mitigate

391. The FREA fails to propose appropriate mitigation of identified impacts.

392. Because defendants failed to identify and assess many impacts, they fail to propose appropriate mitigation.

Section 4(f)

393. FHWA has failed to fully evaluate the potential impact of the CCCH on Section 4(f) properties, and has failed to adequately justify the use of existing Section 4(f) properties.

394. FHWA has failed to properly adopt VTrans' 1986 FEIS and its included Section 4(f) evaluation, and as a result there has been no federal evaluation of Section 4(f) properties in the CCCH corridor.

395. The 1986 FEIS failed to fully and adequately evaluate impacts to Section 4(f) resources in the CCCH corridor.

396. The 1986 FEIS justification for use of the McCrea farm in the I-J segment, identified in the FEIS as a Section 4(f) resource, fails to meet the substantive requirements of a Section 4(f) evaluation.

397. The 1986 FEIS only advanced cost and residential relocation as the justification for the use of the McCrea Farm

398. Neither the possibility of relocating four homes, nor the need to spend an additional $1.2 million to avoid the 4(f) resources, qualifies as a unique problem or unusual factor.

399. The cost, social, economic, and environmental impacts, and community disruption resulting from alternatives which would use less of the McCrea Farm do not reach the extraordinary magnitude necessary to justify the selected alternative.

400. The FREA also illegally segments the Section 4(f) evaluation of the CCCH.

401. The CCCH is a roadway that was originally conceived, planned, and evaluated as a single project.

402. The project has consistently been called the "Chittenden County Circumferential Highway" project.

403. VTrans and FHWA continue to justify the need for the CCCH based on the purported benefits of the entire project.

404. FHWA has segmented the analysis required under Section 4(f) to avoid discussion of impacts to Section 4(f) resources in Segments G-J.

405. Segments A-F and Segments G-J are interdependent parts of a connected action and the impact on Section 4(f) properties through the entire corridor should be considered together.

406. Segments G-J use Section 4(f) resources.

407. Construction of Segments A-B will limit the selection of alternatives if/when construction of Segments G-J is considered. Construction of Segment A-B will provide greater justification for construction of Segments G-J. Segment G-J does not have independent utility and would not be constructed without construction of Segment A-B.

408. FHWA has failed to evaluate whether other resources located in Segments G-J, such as the Colchester School property, are Section 4(f) resources. FHWA has failed to evaluate the impact of Segment G-J on these resources.

409. FHWA has failed to conduct further analysis of how the CCCH will affect the McCrea Farm in segment I-J.

410. FHWA has failed to consider whether the CCCH will constructively use any Section 4(f) properties in Segment A-B.

411. The Allen Brook School Playground is located within 500 feet of Segments A-B.

412. The Allen Brook School Playground is open to the public and is used by the public for recreation.

413. The Defendants have not consulted with local officials to determine the significance of the Allen Brook School Playground as a 4(f) property.

414. The Defendants have not evaluated the potential effect of the CCCH on the Allen Brook School Playground under Section 4(f).

415. The Williston Bike Path crosses Segments A-B.

416. The Williston Bike Path is open to the public and is used for recreational purposes.

417. The Defendants have not consulted with local officials to determine the significance of the Williston Bike Path.

418. The Defendants have not evaluated the potential effect of the CCCH on the Williston Bike Path under Section 4(f).

**Count 1**

419. Defendants violated NEPA because the 1986 FEIS does not comply with NEPA and its implementing regulations.

**Count 2**

420. FHWA violated NEPA and its implementing regulations by adopting the 1986 FEIS.

**Count 3**

421. Defendants violated NEPA by failing to prepare a new or supplemental EIS.

**Count 4**

422. Defendants violated NEPA because the Environmental Assessments fail to comply with NEPA and its implementing regulations.

**Count 5**

423. Defendants violated Section 4(f) of the Transportation Act and its implementing regulations by failing to adequately review the impact of the CCCH on Section 4(f) resources.

**Count 6**

424. Defendants violated the Federal-Aid Highway Act and its implementing regulations by failing to adequately consider the impacts of the CCCH and by failing to follow the Act's public involvement requirements.

**Count 7**

425. Defendants have acted arbitrarily, capriciously, and contrary to the law in violation of the Administrative Procedure Act.

**Request for Relief**

As relief for the above alleged legal violations, the Plaintiffs respectfully request the following:

1. A declaration that the FHWA is in violation of NEPA, Section 4(f) of the Department of Transportation Act, the FAHA, and the APA for approving and funding Segments A-B of the Chittenden County Circumferential Highway.

2. An order requiring the FHWA to withdraw its approval of the CCCH Segment A-B project until such time as the FHWA has complied with NEPA, Section 4(f), the FAHA, and the APA.

3. An injunction against ground-disturbing work in connection with any portion of the CCCH Segment A-B project.

4. Attorneys fees and costs under 42 U.S.C. § 1988, 28 U.S.C. § 2412, and other applicable statutes.

5. All other appropriate relief.

October 15, 2003

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